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In The

Supreme Court of the United States

HARLEY D. ZEPHIER, SR., ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit Court of Appeals erred in failing to recognize the existence of a trust corpus in property and beneficiary rights for and on behalf of the lineal descendants of the Loyal Mdewakantons, from the March 3, 1863 Act and that the existing trust corpus was intended to be implemented and enhanced by the subsequent legislation found in the Appropriations Acts of 1888, 1889, 1890 and 1980.

2. Whether the Federal Circuit Court of Appeals erred in not applying the doctrine of judicial estoppel as set forth in *New Hampshire v. Maine*, 532 U.S. 742 (2001) and thus allowed the United States to argue the existence of a trust and obtain a favorable result in the Eighth Circuit, *Cermak v. United States*, 478 F.3d 953 (8th Cir. 2007) and to argue the lack of a trust and obtain a favorable result in the Federal Circuit, *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009), thereby creating a split in the Circuits.

LIST OF PARTIES

The List of Parties is set out in a separate letter to the Court.

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OPINION BELOW

The three judge panel of the United States Court of Appeals for the Federal Circuit issued its Opinion and Order dated March 10, 2009, reversing the United States Court of Federal Claims decisions that a trust existed in the 1886 lands of the Loyal Mdewakanton Dakota Sioux in Minnesota, by virtue of Appropriations Acts in 1888, 1889 and 1890, and also reversed on the Court of Federal Claims Court's finding that the 1980 Act did not terminate the trust as it pertained to the Loyal Mdewakantons.

STATEMENT OF JURISDICTION

The three judges of the United States Court of Appeals for the Federal Circuit in *Wolfchild, et al. v. United States* reversed the trust rulings of the federal court of claims in its Opinion and Order dated March 10, 2009. The Petitioners filed for rehearing and reconsideration en banc, which was denied by the full panel of the United States Court of Appeals for the Federal Circuit on June 11, 2009. The United States Supreme Court has jurisdiction of this case pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Act of 1889, 25 Stat.980, 992-93 in pertinent part reads:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the

Mdewakanton band Sioux Indians, who have resided in said State since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior as follows: Ten thousand dollars in the purchase, as in his judgment he may think best, of such lands, agricultural implements, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family thereof; one thousand dollars or so much thereof as may be necessary, to defray the expenses of expending the money in this paragraph appropriated; and one thousand dollars for the completion and furnishing of the schoolhouse for said Indians authorized by [the 1888 Act]: Provided, that if the amount in this paragraph appropriated ... shall not be expended within the fiscal year for which either sum was appropriated, neither shall be covered into the Treasury, but shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians: And provided also, That the Secretary of the Interior may appoint a suitable person to make the above-mentioned expenditure under his direction; and all of said money which is to be expended for lands, cattle, horses, implements, seeds, food, or clothing shall be so expended that each of the Indians

> in this paragraph mentioned shall received [sic], as nearly as practicable, an equal amount in value of this appropriation and that made by said act of June twenty-ninth, eighteen hundred and eighty-eight: And provided further, That as far as a practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality against his will.

Act of February 16, 1863, 12 Stat.654, Section One reads in pertinent part: abrogated and annulled all treaties, between said Indians and the United States, declared all lands and rights of occupancy with the State of Minnesota and all annuities and claims heretofore accorded to said Indians or any of them, to be forfeited to the United States.

Act of March 3, 1863, 12 Stat.654. Section Nine reads in pertinent part:

> this statute authorized the Secretary of the Interior [t]o set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the beforenamed bands who exerted himself in rescuing whites from the late massacre [by] said Indians. The land so set apart ... shall be an inheritance to said Indians and their heirs forever.

25 U.S.C. §462 reads in pertinent part: ... [t]he existing periods of trust placed upon any Indian lands

and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

I. STATEMENT OF THE CASE

This is not a case merely about money. This is an important case about recognizing and correcting history concerning a group of honorable people, who have left human legacies of accomplishment, descendancy, heirship, pain, suffering, personal tragedy, loss, near genocide, and hope, for the future. The three judge panel of the United States Court of Appeals for the Federal Circuit, in reversing the Federal Court of Claim's decision recognizing an existing and continuing trust corpus for the lineal descendants of the Loyal Mdewakanton from 1863 through the 1980 Act, if allowed to stand, creates a gross and unjust inequity affecting thousands of justly deserving Native American people. The lineal descendants petition to have this Court correct the obvious conflict within the Federal Circuit Court of Appeals itself and with the Eighth Circuit Court of Appeals decision on the same issue, caused by this Federal Circuit decision. These Petitioners join arguments put forth in the other Petitioners' petition for certiorari.

II. STATEMENT OF FACTS

Thousands of years had passed while the Native peoples of North America lived upon their valued aboriginal homes. The aboriginal inhabitants of the continent viewed possession of material things as shared and communal. The spiritual and ecological

environment allowed for the existence of man, plant and beast, in a balanced ecosystem functioning consistent with the beliefs gained through the guidance of the Great Spirit.

A. HISTORICAL BACKGROUND

Petitioners claim to be lineal decedents of individual Loyal Mdewakantons referenced in the March 3, 1863 Act and the Appropriations Acts of 1888, 1889 and 1890.

Many Petitioners are lineal descendants of the Chiefs Wabasha, Little Crow and Red Wing; Chiefs of the Mdewakanton Dakota Sioux who exercised governance over the Mdewakanton peoples. Individual potentate rights existed as to the Chiefs' heirs and lineal descendants including individual rights, remedies and property interests as set forth in the Sioux treaties from 1825 through 1868. Many of the Plaintiffs are lineal descendants of original Mdewakanton Dakota Sioux listed on the Henton List (commonly known as the "1886 Census" of the Mdewakanton Sioux living in Minnesota since May 20th, 1886), and of the Loyal Mdewakantons (Loyals) derived from various other agency and governmental lists and resources such as the Sioux Scouts and Soldiers list of 1891 (Elrod List), the Renville Rangers, the Brown Scouts lists, the 1899 McLaughlin census, the Santee Sioux census of 1917, the Congressional Globe list of 1863-65, and the Loyal Mdewakanton lineal descendants who do not otherwise appear on any given

census or list, who also would qualify as Loyal Mdewakantons. APP8-20,31-43,58-67,95-96.

B. HISTORY AND THE TREATIES

The significance of the treaties between the Mdewakanton Sioux and the United States, France, Spain and Britain cannot be understated. The Louisiana Purchase in 1803, was an agreement between the French government and the new United States government transferring the right to lands beyond Ohio and Missouri. Predating the Louisiana Purchase, and the Northwest Ordinance of July 13, 1787, it was France through its representatives, that negotiated sovereign to sovereign agreements with the various bands of the Sioux, including the Mdewakanton Sioux, which were based upon recognition of sovereign and *individual* rights of use, enjoyment, occupation and peace, with the Sioux, by and through their headmen and Chiefs, for the benefit of the "bands" as well as the individual members. When a "sovereign" makes *treaties* with another sovereign, such as the French with the Sioux, United States law recognizes that no treaty can be abandoned or abrogated without an express intent to abrogate. A sovereign to sovereign treaty cannot be abrogated by implication, nor by solely executive order or executive act. *United States v. Dion*, 476 U.S. 734, 740 (1986). The same holds true for statutes. The genesis of federal Indian law only started with the onset of legal cases after 1790, in cases such as *Worcester v. Georgia*, 31 U.S. 515 (1832). *See Cohen's*

Handbook of Federal Indian Law, 2005 Ed., Ch.2, Sec. B.4, p. 60-72.

The Louisiana Purchase, however, never included the sovereign interests of the Sioux, nor the Mdewakanton Sioux. *Treaty Between the United States of America and the French Republic, April 30, 1803 in Treaties and Other International Acts of the United States of America*, v.2 (Hunter Miller ed.) (1931). The Louisiana Purchase, which allegedly formed the basis of the sovereign to sovereign relationship between the United States and the Sioux and its people, was not negotiated or agreed upon by any of the Sioux bands, tribes or individual chiefs. Article III recognizes:

> that "the inhabitants of the [Louisiana Territory] ceded territory shall be incorporated in the Union of the United States admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of liberty, property and the Religion which they profess."

Id.

Further, Article VI of the Treaty stated that "The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or

nations other suitable articles shall have been agreed upon." *Id.*

The Mdewakanton's aboriginal lands existed in the Minnesota and Dakota Territories. Only through the treaties of 1825, 1831, 1837, 1851, 1858 and 1868, have the United States and its agents dealt with the Mdewakatons and its individual Dakota Indians.

C. THE MINNESOTA SIOUX BEFORE AUGUST 1862

Before the formation of the United States, the Mdewakanton Dakota Sioux began seeing foreign visitors in their lands in Iowa, Wisconsin, Michigan and Minnesota. The territory of Minnesota prior to the 1851 Treaty of Traverse des Sioux, included only original counties called Wabashaw, Dahkotah, Mahkahta, Henton, Ramsey, Washington, Itasca, Pembina and Iowa. The County of Wabashaw alone, encompassed the *present day* southern portion of the present day state of Minnesota and beyond.

With the treaty cession to the United States in 1851, the trust responsibilities of the United States and its agents to the Mdewakanton Dakota Sioux bands, was clearly established in the form of rights, remedies, payments and annuities granted to the bands, and to the individual members of said bands. *See Mdewakanton & Wahpakoota Bands of Sioux Indians v. United States,* 57 Ct.Cl. 357, 359-61 (1922). App. 19.

The 1851 and 1858 treaty provisions recognize a "self-executing" right of the *individuals*, not just the band/tribe, that allows a protected individual within the Mdewakanton band, the clear right recognized by Congress, to pursue individual rights, remedies and privileges, associated with the life, liberty and property as protected by said Treaty. *Treaty between the United States and the Mdewakanton and Wahpakoota Bands of Dakota or Sioux Tribe of Indians*, Articles III and IV, March 31, 1859, 12 Stat.1031. The self-executing treaty provisions of the Treaties of 1851 and 1858, allowed for any individual Mdewakanton Indian to assert their own property and privacy interests and to use the (later) due process clause of the U.S. Constitution and the treaty rights to preserve and protect said rights. *See Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing a self-executing treaty right for lineal heirs).

D. 1862 SIOUX UPRISING

The following recorded firsthand accounts of the dealings with the United States, document the historical experiences of the Dakota Sioux leading up to the forced removal of the Dakota from Minnesota:

> Under the treaty of Traverse des Sioux [1851] the Indians had to pay a very large sum of money to the traders for old debts, some of which ran back fifteen years, and many of those who had got the goods were dead and others were not present, and the traders' books had to be received as to the

> amounts, and the money was taken from the tribe to pay them. Big Eagle's Account, *Through Dakota Eyes*, at 24 (Gary Clayton and Alan R. Woolworth, eds. 1988).
>
> As the summer advanced, there was great trouble among the Sioux – troubles among themselves, troubles with the whites, and one thing and another. The war with the South was going on then, and a great many men had left the state and gone down there to fight. A few weeks before the outbreak the president [Abraham Lincoln] called for many more men, and a great many of the white men of Minnesota and some half-breeds enlisted and went to Fort Snelling to be sent South....

Id. at 25.

> At last Maj. Galbraith went to work about the agencies and recruited a company of soldiers to go South. His men were nearly all half-breeds. This was the company called the Renville Rangers, for they were mostly from Renville county.

Id. at 25-26.

> At last the time for the payment came and the Indians came in to the agencies to get their money. But the paymaster did not come, and week after week went by and still he did not come. The payment was to be in gold. Somebody told the Indians that the payment would never be made. The government was in a great war, and gold was scarce,

> and paper money had taken its place, and it was said the gold could not be had to pay us. Then the trouble began again and the war talk started up. Many of the Indians who had gathered about the agencies were out of provisions and were easily made angry. Still, most of us thought the trouble would pass, and we said nothing about it. I thought there might be trouble, but I had no idea there would be such a war. Little Crow and other chiefs did not think so. But it seems some of the tribe were getting ready for it.

Id. at 24-27.

> Among the many people in the reservation community were the Franco- and Anglo-Dakotas.... Officials of the United States Office of Indian Affairs conducted a census in 1855-56 that showed about 650 mixed-bloods of Mdewakanton descent in Minnesota. [APP 97-102]. Some of the group had merged with the white population of eastern Minnesota, but most were living on the reservation. After 1856 the developing farm programs on the reservation provided an incentive for others to join them. Many also worked on the reservation being employed by the traders as clerks or the government as interpreters. Juggling two distinct cultures at the same time – occasionally serving one and then the other – repeatedly placed the Franco- and Anglo-Dakota people at the centers of controversies.

Id. at 12.

> In 1862 many Dakota Indians who continued to live by the hunt began feuding with traders over the issue of past payments for debt. Funds from the 1858 treaty, it was believed by the Dakotas, had paid all past debts owed by individual Indians. Traders, on the other hand, argued that Indians had received credit after the treaty. By the spring of 1862, traders and their Indian customers were on the verge of a violent break. Many of the mixed-bloods were caught squarely between two groups.

Id. at 12.

> The conflict over traders' debt was only one of several important issues creating unrest. Indian agents as early as 1860 had adopted the practice of handing out annuity money and food only to Indians who showed some inclination to become farmers.

Id.

The 1862 Uprising events began simply enough when four young Dakota Sioux men from Shakopee's village found themselves in Acton, Minnesota:

> The tension had escalated in early August 1862, and several small hunting and war parties left the reservations. These groups were dominated by young men, some of whom were angry over the way whites had treated their people and the failure of traders to assist the Indians.... One of these parties from Shakopee's village on Rice Creek met and quarreled with Robinson

> Jones, a settler after they had taken egg's from settler's hen's nest, near the small community of Acton. The impassioned warriors turned on Jones, killing him and several members of his family and creating the spark that ignited the war.

Id. at 34.

Another account was recorded by Cecelia Campbell Stay on the first day of the Outbreak, at the Redwood Agency where she lived with her Dakota mixed-blood family:

> Another incident I want to bring before my readers is that same day [Aug.18, 1862], [I] shall name our family first for we lived at that house, where some taken prisoners were congregated. There was Grandmother Mrs. Margaret Scott Campbell [Campbell], Uncle Hypolite [and his] wife Yuratwin (a cousin of Standing Buffalo) and two children John & Theresa, Uncle Baptiste, Uncle Scott, father, A.J. Campbell, mother, sister Emily 15 years old, myself (Celia), 13 and Mary 9, Joseph 7, Martha 5, Willie 2, Stella about 7 weeks old. All those who were fleeing fugitives [and were] brought back to us were Mrs. Antoine Findly and step-son Billy Findly, Louis Martin [and his] wife and three children. Mrs. Matilda Vanosse [with] one child on her back ... she would fall in a fit.... Uncle Scott went, met them and between them they got her to the house.... Mrs. Findly never left us during the seven weeks of our captivity until [she was] safe back to Traverse des Sioux

> [and] out of danger. Cecelia Campbell Stay's Account.

Id. at 51-52.

> One of the soldier band among the hostiles stood up and answered that they knew the white people were too strong for them, but their object was to make the white women and children stay with them and suffer with them when the whites drove them out of the country. Following this speech, the hostile warriors mounted and before riding away they said that all the half-breeds and friendly Indians must come to their camp and unite forces with them the next day, other-wise they would return and force them to join. Victor Renville's Account.

Id. at 193.

> After the hostiles left, an old man, Nach-pi-ya-wi-ca-xta [Cloud Man], got up and said that these hostiles, after breaking all treaties and causing the friendly Indians to lose their annuities, were now planning to make them all captives. He also said that they must send out messengers to call all the camps together and prepare to attack the hostiles.

Id. at 193-94.

> When word was received of the approach of more hostiles, the friendly Indians struck camp and went up the river, pitching camp on the west side. The hostiles followed and camped a mile away. The friendly Indians

> then held a council and sent General Sibley a letter written by Thomas Robertson, who had escaped from the hostile camp. He, with a comrade, carried the letter to Fort Ridgely. Robertson was allowed to enter the fort blindfolded and was able to explain to Sibley what the friendly Indians were trying to do. He also carried Sibley's letter back to the friendly camp with the message that the general was not fighting his friends among the Indians and half-breeds.

Id. at 94.

> Early in the morning the half-breeds and friendly Indians rode out ahead of the attacking hostiles and by showing themselves here and there, gave plenty of warning. When the attack began the soldiers were ready and by the unexpected use of cannon the enemy was driven off. The hostiles now rode back to their own camp and began to make ready to escape. This gave the friendly Indians and half-breeds an opportunity to ride into the hostile camp and snatch the women and children captives from the Indians who were about to carry them off. They carried these prisoners to their own camp which they defended with ditches and breastworks. Over the camp of the friendly Indians floated a white flag as a sign that they were not hostile to the whites.

Id. at 238. APP112.

Following the uprising, thousands of Dakota Sioux were taken captive regardless of whether they acted against or in assistance of the whites. These Dakota men, women and children, (including half breeds and mixed bloods), were held captive for many months at Camp Release, Fort Snelling and other sites. APP112. Sibley's forces scoured the country for hostile Indians and succeeded in taking more than four hundred. The troops then rushed in upon what remained of the hostile camp and took all the captives and supplies. They then established a military tribunal and tried their Dakota prisoners. Those found to have committed atrocities were imprisoned and many of them were sentenced to death.

> Two days before the departure of the prisoners, the rest of the captured Sioux were sent down the river to Fort Snelling. They, too, were attacked along the way. As they passed through Henderson, they were set upon by the enraged populace with guns, knives, clubs, and stones. Several were injured, and one infant was so badly hurt that it soon died. Those who survived this assault and the following winter remained in a dismal encampment on the flats below Fort Snelling for about six months, tormented by wild rumors concerning the fate of their menfolk and perpetually in danger of being killed by parties of whites who repeatedly threatened to break through the wooden fence erected for their protection. Roy W. Meyer, *History of the Santee Sioux*, at 128 (Revised ed. 1993). APP1,9-20.

> When the trials were completed, the general assumption was that all 303 of the men condemned to death would be speedily hanged. President Lincoln, however, intervened and ordered General Pope to send him the complete trial record.... Lincoln's action was, of course, displeasing to the people of Minnesota, whose spokesmen, Governor Ramsey and the congressional delegation, had been insisting that the Indians must all be executed or lynch law would prevail....

Id. at 128.

> A last-minute change of schedule was the removal of one name from the list of those to die. The remaining thirty-eight condemned mounted the scaffold chanting their death song, reluctantly allowed the white caps to be adjusted over their heads, and then attempted to grasp each other's hands in a final gesture of solidarity. The trap was sprung by William Duley, some of whose family had been killed at Lake Shetek. His personal desire for revenge and that of the spectators was satisfied as thirty-eight Sioux corpses dangled from the scaffold. [The largest mass execution in Unites States history]. When all had been pronounced dead, the bodies were buried in a shallow grave nearby, from which they were shortly exhumed for use as cadavers by local physicians. [including, by Dr. W.W. Mayo]

Id. at 129-30; *also see* Loren Dean Boutin, *Cut Nose: Who Stands on a Cloud*, at 93-110 (2006). APP5.

> Although the newspapers of Minnesota were calling for the expulsion of all Indians from the state, attention naturally centered early in 1863 about the Sioux who had been taken into custody at Camp Release. These people – the prisoners held at Mankato and the larger group at Fort Snelling – spent a miserable and anxious winter. The condemned men probably fared better than their families. Out of the 350 or more, only thirteen died during the winter, as against about 130 in the camp at Fort Snelling.

Id. at 136. APP1,9-20.

> Under such pressure from their constituents and their political opponents, both the Minnesota legislature and the congressional delegation moved rapidly to bring about the expulsion of the Sioux from the state. As early as Governor Ramsey's special message to the legislature on September 9, 1862, the idea was broached of abrogating all treaties with the Sioux and reimbursing victims of the uprising from the annuities still due under the treaties.

Id. at 139-40.

> The advocates of outright extermination, though noisy, were not numerous among people whose opinion carried much weight in the determination of policy. Even Galbraith, who confessed to "feelings of exasperation against these savages" and who was emotionally involved by the need for self-justification, conceded in his official report

> that "few will contend that the Sioux and all other Indians can be '*exterminated*' just now."

Id. at 141.

> [Rev. John] Williamson wrote his mother from St. Joseph that if all 1,300 were crowded onto one boat, it would be "nearly as bad as the Middle Passage for slaves." He later described conditions on board the *Florence*, saying that when 1,300 Indians were crowded like slaves on the boiler and hurricane decks of a single boat, and fed on musty hardtack and briny pork, which they had not half a chance to cook, diseases were bred which made fearful havoc during the hot months, and the 1,300 souls that were landed at Crow Creek June 1, 1863, decreased to one thousand.... So were the hills soon covered with graves. The very memory of Crow Creek became horrible to the Santees, who still hush their voices at the mention of the name.

Id. at 146.

For years following the Sioux Uprising in 1862 and the forced removal of the Dakota from Minnesota, the State led by the profiteer Alexander Ramsey as Governor, placed a bounty on any Sioux person found in Minnesota. The bounty was for $200.00 for each Sioux scalp that could be shown as proof of the killing. *New York Times*, August 18, 1863;APP120.

> Whatever the end of the Sioux Uprising may have meant to the white man – a chance to speculate in land or acquire a farm in lands previously unavailable, a demonstration of the Lord's saving power over men about to be executed, or something else for the Sioux it meant just one thing: catastrophe. It meant their expulsion from the land where they and their ancestors had lived since the immemorial past, and more than that, it meant the shattering of whatever unity the Santee bands had possessed. Never again were the Mdewakantons, Wahpekutes, Sissetons, and Wahpetons one people, occupying a single fairly well defined land area. Henceforth they were scattered over states and provinces, with hundreds of miles separating their dispersed settlement and the lands between rapidly filling up with white men, who learned eventually to tolerate the Indian, if only to exploit him, but never to accept him as an equal.

Meyer, supra at 132.

The Uprising itself, in August 1862, was partly precipitated upon a known policy of planned removal and/or genocide developed by the officials of United States, and with local counterparts such as Alexander Ramsey (Indian Agent and Governor of Minnesota Territory) and Henry Sibley (Governor and Army Colonel). *Marx Swanholm, Alexander Ramsey and the Politics of Survival*, 16-17 (1977). These two gentlemen ended up profiting handsomely from financial and land transactions immediately before

and following the 1862 uprising and the passage of the 1863 Act. *Id.* at 12-13. Federal executive branch officials continued to open up the valuable lands of the Mdewakanton, even after the 1858 treaty, to usurpation by settlers and land speculators in clear violation of all existing treaty rights with the Mdewakanton bands. The purposeful act of depriving the Mdewakantons of their annuity payments and treaty benefits between 1858 and 1862, created a dangerous and life threatening situation for the people. APP116-18.

E. THE IMMEDIATE AFTERMATH OF THE 1862 UPRISING

Some Minnesota Sioux had remained loyal to the United States during the uprising. When the February 16, 1863 Act was passed, allegedly abrogating all previous treaties and annuities between the Mdewakanton and the United States prior to the 1862 Uprising, the United States attempted to utilize a knee-jerk, across the board abrogation process, to divest any and all of the land, property, annuities, property interests, privileges, and future interest and lives of even the *loyal* Mdewakanton Sioux people, despite the fact that many Mdewakantons never warred against the white settlers or the U.S. Army. However, at the same time that Congress stripped the Minnesota Sioux of their Minnesota lands, it authorized the Department of Interior to allocate up to eighty acres of that land to each loyalist. Act of March 3, 1863. 12 Stat.652-54, Sections 1 and 9.

F. THE MARCH 1863 ACT AS AN ENABLING ACT

The March 3, 1863 Act (hereinafter "the 1863 Act") is an enabling statute with an enabling provision for present, future and subsequent legislation, including the Appropriations Acts of 1888, 1889 and 1890, and the 1980 Act.

> Enabling statute: Term applied to any statute enabling persons or corporations, or agencies to do what before they could not. It is applied to statutes which confer new powers.

Black's Law Dictionary, 526 (6th ed.1996).

> Enabling clause: That portion of the statute or constitution which gives to governmental officials the power and authority to put it into effect and to enforce such.

Id.

In moving to pass the abrogation of certain existing treaty rights of the Minnesota Dakota Sioux bands, to land and annuities, Congress was utilizing its political authority to pursue the goal espoused by many in the United States and local Minnesota government – to exterminate or eradicate the race of the Sioux from Minnesota. *Swanholm*, *supra* at 16. Even with the pressure and influence from power-brokers such as Alexander Ramsey, the sweeping move to wipe out all existing treaty rights did not succeed. *See* Debate over the 1863 Act, APP22-34.

Although the allocation of land to the loyal Mdewakantons provided for in Section 9 of the 1863 Act was not immediately implemented, it led Congress to further provide for the Loyal Mdewakanton in 1888, when it authorized the Department of Interior to expend additional funds on their behalf. Congress recognized that when it declared the Minnesota Sioux's treaties, annuities, and allocation of land forfeited in 1863, it intended to make an exception for the Loyal Mdewakanton, whose annuity was valued at approximately $1,000,000. *See* 19 Cong.Rec. H2976-77 (daily ed. Apr. 14, 1888) (Statement of Rep. MacDonald). As a result of a failure of executive branch officials to implement the 1863 Act, many loyal Mdewakanton were rendered homeless. *Id.* at 2977. The 1888 Act provided benefits for the full-blooded Mdewakanton. Because of the administrative difficulty of determining which Mdewakanton remained loyal during the 1862 uprising, Congress determined that presence in Minnesota on May 20, 1886, served as an adequate *proxy* for "friendliness." (JA0320). Therefore, the initial and most recognizable definition of "friendly" or "Loyal Mdewakanton," is if there is evidentiary proof of the individual Mdewakanton ancestor actually assisting in rescuing or protecting the white settlers during the 1862 uprising, as many were recognized in doing.[1]

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[1] Therefore, it is obvious that the other groups such as the Sioux Scouts and Soldiers (Elrod List), etc., also would qualify as

(Continued on following page)

An act in 1889 added a further benefit provision calling for each Loyal Mdewakanton to receive "as practicable, an equal amount in value of this appropriation...." *Act of 1889*, 25 Stat.980, 992-93. In a third appropriation act in 1890, Congress added $8,000 and adopted the same substantive provisions as the 1889 Act, except that it expressly stated that the further appropriated amount was to support Indians of both "full- and mixed-blood." *Act of Aug. 19, 1890*, 26 Stat.336, 349. The latter two acts called for funds to carry over if the Department of Interior did not spend them by the end of the fiscal year, ensuring that the Loyal Mdewakanton and their descendants and heirs would benefit from the appropriation into the future.

Utilizing the proxy determination of lineal descendancy to ascertain which Mdewakanton lived in Minnesota on May 20, 1886, Agent Walter McLeod took a census listing all of the full-blood Mdewakanton. (*See* JA0237-0247;JA0315). Inclusion on the McLeod list has been deemed by the Agency to create a rebuttable presumption that an individual met the eligibility requirements of the subsequent 1888, 1889, and 1890 Acts. (*See* JA0059;JA0320).

On January 2, 1889, Robert B. Henton, Special Agent for the Department of Indian Affairs, took a second census of those Mdewakanton living in

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Loyal Mdewakantons, along with the proxy definition ancestors. APP37-41,95-96.

Minnesota since May 20, 1886. (*See* JA0315;JA351-0363;JA0323). The McLeod and Henton censuses (together, "1886 census") were initially used to determine who would receive the benefits and in what amounts appropriated under the 1888, 1889, and 1890 Acts.

The task of determining those beneficiaries of the various Acts did not cease with these two censuses. Henton's duties included purchasing various items on behalf of the Mdewakanton, including land. *Wolfchild I*, 62 Fed.Cl. at 528 n.7. Later, James McLaughlin was given the authority to make an additional census. In a letter dated February 20, 1899, McLaughlin was instructed to make a "complete census of the Mdewakanton (sic) band of Sioux Indians in Minnesota...." APP62. Part of his task was to ensure any Indians who were improperly enrolled as members be prevented from receiving additional payments. *Id.* McLaughlin completed his task in March of 1899. APP65-67.

It is logical to recognize that the congressional acts concerning the Loyal Mdewakantons subsequent to the 1863 Act, were designed to implement the reserved and self-executing treaty rights of Loyal Mdewakanton as recognized in Section 9 of the 1863 Act. As an enabling act, Section 9 of the March 3, 1863 Act is self executing as to individual rights, privileges and remedies for the Loyal Mdewakantons and their heirs.

The self-executing rights to potentate lineal descendancy of the Mdewakanton Sioux continued to be recognized in the 1868 Treaty of Fort Laramie. The Ft. Laramie Treaty of 1868, included Chief Wabasha III, a direct potentate lineal descendant of Chief Wabasha who signed the 1851 and 1858 treaties as a recognized signatory. The Fort Laramie Treaty of 1868 also contained self-executing provisions affording rights to assert individual rights, remedies and privileges to preserve and protect property, property interests and other personal rights.

Article I of the Fort Laramie Treaty provides:

> If bad men among the whites, or among other people subject to the authority of the United States shall commit *any* wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the law of the United States, and also reimburse the injured person for the loss sustained (emphasis added).

Id.

The Fort Laramie Treaty of 1868 postdated the 1863 Act, and is still good law, as evidenced in *United States v. Sioux Nation of Indians*, 1448 U.S. 371 (1980); and *Elk v. United States*, 87 Fed.Cl. 70 (2009). Since Chief Wabasha III was an invited signatory on behalf of the Mdewakanton/Santee Dakota Sioux, this indicates that Congress continued to recognize the

Mdewakanton Sioux still held individual rights and interests including potentate lineal descendancy rights. If the Mdewakantons had no existing self-executing potentate rights after Congress passed Section 1 of the 1863 Act, Chief Wabasha III would not have been invited to sign the 1868 Treaty of Ft. Laramie on their behalf.

It is clear that the individual self-executing rights of the earlier treaties (1837, 1851 and 1858) were existent and preserved, particularly as to the Loyals, even following the 1863 Act of Congress. The 1868 Ft. Laramie Treaty recognized the important right of potentate lineal descendancy of the Mdewakanton Sioux. The canons of construction must favor the rights of the individual Indian if any ambiguity exists as to treaty or congressional statute interpretation, as here. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 562 U.S. 172, 200 (1999); *United States v. Dion*, 476 U.S. at 740.

The 1837, 1851 and 1858 Treaties predated the 1934 Indian Reorganization Act, as did the 1868 Fort Laramie Treaty. The individual, self-executing treaty rights continued to exist through lineage and heirship, and survived the passage of later acts of Congress not explicitly abrogating these rights, including the 1934 IRA, and the later acts leading to the formation of the Shakopee Mdewakanton Dakota Sioux Community, the Lower Sioux Indian Community and

the Prairie Island Indian Community. *See Elk v. United States*, 87 Fed.Ct. 70 (2009).

REASONS FOR GRANTING THE PETITION

III. TRUST EXISTED SINCE 1863

By recognizing the importance of Section 9 of the March 3, 1863 Act as confirmation of the existence of a trust corpus in land and rights in favor of the "Loyal Mdewakantons and their heirs, forever," the Federal Circuit Court of Appeals acknowledged that the 1863 Act in fact recognizes congressional intent to acknowledge the existence of the trust corpus for the Loyal Mdewakantons, prior to and at the time of the enactment of the Act of February 16, 1863, 12 Stat.654. The Panel emphasized the lower court's finding on the issue. *Wolfchild I*, 62 Fed.Cl. at 542; Order of March 10, 2009, p.20.[2]

The fact that the Panel recognizes this important trust finding of the Trial Court reemphasizes the fact that the trust corpus was still in existence in 1863, in 1888, 1889, 1890, 1934, 1969 and again in 1980. The trust cannot be terminated by anything but clear

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[2] In pertinent part, the March 3, 1863 Act, Section 8 states, the intent "[T]o set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing whites from the late massacre [by] said Indians. The land so set apart ... shall be an inheritance to said Indians and their heirs, *forever*. Act of March 3, 1863, 12 Stat. at 654." (Emphasis added).

congressional intent to do so. The trust corpus was never clearly terminated, but was only furthered by appropriation and the statutory enactments following the 1863 Act. (JA00455-459). The trust was intended to exist for *all* heirs of the Loyal Mdewakantons, *forever*. The attempts prior to 1863 to fully implement a policy of genocide and extermination of the Mdewakantons from Minnesota, regardless of their participation in the uprising, were halted by Congress in 1863 with the passage of Section 9 of the 1863 Act. The subsequent legislation attempted to expand the unimplemented rights and remedies of the trust, protected for the Loyal Mdewakanton beneficiaries over the years.

Despite the fact the evidentiary record before the Trial Court had not yet been fully developed or completed prior to the interlocutory appeal of the two certified "Trust" questions, the Federal Circuit made critical findings on genuine issues of material fact in dispute in the underlying litigation, to reach the Panel's March 10, 2009 decision.

This litigation concerns valuable past, present and future rights and remedies of over 22,000 potential beneficiaries, i.e., the actual lineal descendants of the Loyal Mdewakantons. With its Order of March 10, 2009, the Panel, with the single stroke of a pen, has wiped out and destroyed the viable and legitimate claims, remedies and rights of over 22,000 Native American citizens without a trial. The Panel voted to reverse the decisions of the Federal Court of Claims finding that a trust did in fact exist during

the time of the "1886 Lands" appropriation in 1888, 1889 and 1890. In reversing that decision, the Panel has made a glaring and critical mistake in determining, without a trial, that the three Minnesota Communities are largely comprised of only lineal descendants. March 10, 2009 Order, p.8.

The Panel ignores the fact that the beneficiaries and/or lineal descendants are a defined class, but not yet fully and factually determined by the Trial Court. Initially, the Panel misstates the legal reference to the beneficiaries/lineal descendants. The true beneficiaries/lineal descendants are descendants of the "Loyal Mdewakantons," and not just the "1886 Mdewakantons." This is a critical distinction, in that the Loyal Mdewakantons are defined as trust beneficiaries within Section 9 of the 1863 Act itself (enabling act). The language of the 1863 Act indicating an " ... inheritance to said Indians and their heirs, forever," is a strong, self-executing declaration of the intent of Congress to benefit the Loyals.

The Panel appears to follow its own distorted view of the recent and present day makeup of the enrollment of the three communities, based on the misinterpretation of statistics.[3] The present day membership of the three communities may be made up of a significant majority of true lineal descendants, but the Panel ignored the fact that there are

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[3] Many of the Plaintiffs question whether all enrolled members are actual lineal descendants.

thousands additional, rightfully entitled, true lineal descendants of the Loyal Mdewakantons, that are *not* recent, past or present enrolled members of the three Minnesota communities, even though they may be as or more entitled to membership enrollment than many members that are or have been enrolled. The Panel's conclusion that 95% of all of the true lineal descendants were enrolled in the present communities is a factual finding on an issue in dispute in this case. This incorrect conclusion explains the Panel's lack of focus within the Opinion on interpreting the trust existence and 146 year agency "trust" treatment, management and handling of these lands and issues. The Panel likely believed that the number of persons likely affected is small rather than in excess of 22,000 living descendants Congress sought to benefit by enacting Section 9 of the 1863 Act.

The Panel ignores the fact that the 1863 Act is an enabling act and that the Appropriations Acts were clearly intended to be used to implement land and property interests, including trust corpus interests, for and on behalf of the lineal descendants of the Loyal Mdewakantons. The Panel never explained how it concluded that Section 9 of the 1863 Act and the Appropriations Act of 1888, 1889 and 1890 are unrelated.

The Appropriation Acts, in this context, must have a trust corpus in which to function as intended. These Acts of 1888, 1889 and 1890 did not create the trust – the trust existed from the 1851 and 1858

treaties, as preserved in Section 9 of the 1863 Act. Without the Appropriation Acts there would be no clear direction for the trustee. The certified questions from the Trial Court do not ask whether or not a trust was created by the 1888, 1889 or 1890 Acts. The question is "whether a trust was created *in connection with* and *as a consequence* of the 1888-1890 Acts...." The Appropriation Acts did not themselves *create* the trust. The enabling 1863 Act, as executed through the 1888-1890 Acts, clearly establish the existence of a trust. This creates a conflict of holdings within the Federal Circuit Court of Appeals, as stated below.

IV. JUDICIAL ESTOPPEL

"'Judicial estoppel' applies when a party takes a later position that is inconsistent with a former position in the same dispute, on which the party had been successful and had prevailed based on the former position." *Bonzel v. Pfizer, Inc.*, 439 F.3d 1358, 1362 (Fed.Cir.2006). This Court has listed three factors which are proper to consider in determining whether judicial estoppel applies: (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) the party succeeded in persuading a court to accept that party's earlier position; and (3) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (citations omitted). Each of these

factors are present here. In essence, the Federal Circuit Court of Appeals has sanctioned the use of a litigant taking different positions to achieve its intended result. This runs directly afoul of the principles enumerated in *New Hampshire*.

A. The Government has argued mutually exclusive provisions: a trust relationship existed; and its current position that one does not.

In this litigation the United States consistently argued there is not now, and there has never been a trust relationship. However, in the past the United States has argued just the opposite: that is, there was a trust. Despite this conflict, the United States not only was allowed to proceed with its new theory, its new theory was adopted. To apply judicial estoppel, this Court must compare the United States' latter position with its current position. The United States' petition for discretionary appeal in this case asserted that the "Appropriation Acts" did not create a trust relationship between the Plaintiffs and the United States. It further contended Congress terminated the trust with legislation enacted in 1980. Petition at 10-18. In earlier cases, the government argued the existence of a trust arising under the 1863 Act and/or the Appropriation Acts and that the 1980 Act continued rather than terminated the trust.

First, in *Cermak v. United States,* U.S. C.O.F.C. Case No. 01-568, the United States argued that the

1863 Act and/or the Appropriation Acts created a trust. (JA06045).

Second, the United States in *Cermak v. Babbitt,* U.S. Dist. Court (Minn.) Case No. 98-1248, filed a motion in 1999 to dismiss the plaintiffs' claims arguing that a *trust arose* under either the 1863 Act and/or the Appropriation Acts:

> ***The Department's position regarding Indian Land Certificates was consistent over the years.*** *See* Ex. G, Letter from Acting Assoc. Solicitor, Indian Affairs, to Commissioner of Indian Affairs at 3 (May [sic] 19, 1974) (describing the interest in Indian Land Certificates to be either a tenancy at will or defeasible interest) (emphasis added).

The government's cited 1974 letter concluded, "[t]he lands *are held in trust* by the United States with the Secretary possessing a special power of appointment among members of a definite class." (JA00396) (emphasis added).[4]

In *Cermak* the United States argued that the Indian Land Certificate scheme was the Department's reasonable interpretation of its trust obligations under the 1863 Act and/or the 1888, 1889 and

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[4] The United States earlier used this same argument in support of the Interior Board of Indian Appeals' position of the existence of a trust. "The lands are held in trust by the United States with the Secretary possessing a special power of appointment among members of a definite class." *Brewer v. Acting Deputy Assistant Sec'y*, 10 IBIA 110, 119, n.8 (1982).

1890 Acts. The United States even argued the Department's position under the 1863 and Appropriation Acts should receive *Chevron* deference. *Id.* at 22.[5]

As to the 1980 Act, the government argued that the rights of Plaintiffs were "grandfathered" and unaffected by the 1980 Act. *Id.* at 8-9, 16.

In its submission dated April 27, 1999, the government went further stating, "[a]s Congress contemplated, the named individual holders of Indian Land Certificates (such as John Cermak) would be safe in their use and possession until their death after the 1980 Act." *Id.* at 5.[6]

Third, the United States, in its February 29, 2008 brief in opposition to the Cermaks' appeal in the

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[5] Additionally, in order to avoid the reach of the Quiet Title Act, the government conceded the 1886 Lands were trust lands, "If the Plaintiffs wish to claim that the Certificates 64 and 65 were actually allotments issued to John Cermak under the GAA, then these lands would be trust or restricted Indian lands and fall under the QTA's exception." *Id.*

[6] As the United States knows or should know, not all the named individual holders of Indian Land Certificates are dead. For example, one plaintiff, the very much alive Morris Pendleton, received his Certificates in 1979 (Att. E). The United States in this matter failed to account for the "grandfathering" of Morris Pendleton's beneficiary rights – and all others similarly situated – and his concomitant claims for trust mismanagement. The limited purpose of showing the United States' earlier, inconsistent position on the 1980 Act here is to show the United States argued in 1999 that the 1980 Act *continued* the trust. This is in direct contradiction to its position now that the 1980 Act *terminated* the trust.

United States Court of Appeals for the Federal Circuit, again argued: that a trust arose under the 1863 Act and/or the Appropriation Acts; that the 1980 Act altered, rather than terminated, the legal status of the trust lands; and subsequent assignees were "grandfathered in." The United States argued:

> In 1980, however, Congress did enact legislation that *altered legal status of the land* subject to the Indian Land Certificate program and placed those lands in trust for the Shakopee Mdewakanton Sioux Community as a whole.... *Section 3 of the 1980 Act made clear that all existing assignments, issued under the Land Certificate Program, were "grandfathered in" and unaffected by the legislation....*
>
> The Department acquired the lands at issue here under the three aforementioned appropriation acts that authorized the Secretary to buy lands for the benefit of certain Indians who were, or who were once affiliated with, the Mdewakanton Sioux. *See* Act of December 19, 1980 (stating that "all right, title and interest of the United States in those lands ... *which were acquired and are now held by the United States for the use and benefit of certain Mdewakanton Sioux Indians under [appropriation statutes]* are hereby declared to hereafter be held by the United States ... for the [Shakopee Community]") (emphasis added).

The litigation waged by the Cermaks is not only a prime example of the applicability of judicial estoppel

but also the need of this Court to settle the question as to the proper forum for such a claim.

Once the matter made its way to the Federal Circuit, the United States' position that the 1863 Act created a trust did not change. *See Cermak v. Babbitt*, 234 F.3d 1356, 1358-59 (Fed.Cir.2000), *pet. for cert. denied, Cermak v. Norton*, 532 U.S. 1021 (2001).

It is respectfully suggested the Court grant the petition to rectify the perverse history of the manner in which these claims were addressed which allows the government to argue mutually exclusive positions.

B. The United States was successful in the earlier litigation.

The United States District Court and the United States Court of Federal Claims adopted the United States' earlier positions regarding the existence of a trust corpus to dismiss the Cermaks' claims. The Cermaks' claims started in the United States District Court for Minnesota. *See Cermak v. Babbitt*, 1999 U.S.Dist. LEXIS 22390, No. 98-1248 (D. Minn. July 12, 1999). The matter was transferred to the United States Court of Federal Claims. *Id.* The Cermaks appealed to the Eighth Circuit which transferred the appeal to the Federal Circuit. *Cermak v. Babbitt*, 234 F.3d 1356, 1358 (Fed.Cir.2000).

While *Babbitt* involved a jurisdictional question, the question hinged on the status of the land. The

United States argued jurisdiction was lacking because the land was "held in trust by the United States for the Community's benefit." *Id.* at 1359. The Federal Circuit accepted the government's argument and affirmed the transfer. *Id.* at 1364.

Thereafter, the Court of Federal Claims held the 1980 Act "transferred property that the United States held in trust for the individual Mdewakanton Sioux, to the Sioux Community." (JA06115). The court transferred the case to Minnesota. (JA06120).

Back in Minnesota, Judge Doty agreed with the government that "such lands were held in trust for the use of certain Indians" and cited the IBIA decision in *Brewer* as support:

> The AAD [BIA Acting Area Director] based his decision not to reissue certificates in favor of plaintiffs on the agency's interpretation of the Act of 1863, whereby land was to be set aside for assignment or allotment to certain Indians, and its ruling in *Gitchel*. (Cermak AR Ex. 9, TOC.) The agency has consistently asserted that certificate holders such as John Cermak did not receive allotments and were not beneficial owners of a possessory interest in allotted trust lands. *See Brewer v. Acting Deputy-Indian Affairs*, 10 IBIA 110 (1982). Rather, such lands were held in trust for the use of certain Indians. *See id.* at 116. The Secretary of the Interior did not grant any permanent interest in the lands, *pending*

> *further legislation. See id.* at 117 (emphasis added).

Cermak v. Norton, 322 F.Supp.2d 1009, 1015 (D.Minn. 2004), *aff'd, Cermak v. United States,* 478 F.3d 953 (8thCir.2007).

The Federal Circuit, after consolidating *Cermak* with *Wolfchild I*, affirmed the dismissal of the Cermaks' breach of duty claims. It held the "Department of the Interior as trustee had discretion over the assignment" of trust lands:

> With respect to the *Cermak* plaintiffs' claim for breach of legal duty (referred to originally as a "breach of trust" claim by the Cermaks), the government did not breach a legally cognizable duty by refusing to assign the Certificates to Raymond and Stanley Cermak because no such duty existed. *See Gitchel*, 28 I.B.I.A. at 48; *Brewer*, 10 I.B.I.A. at 116-19; *see also Wolfchild I*, 62 Fed.Cl. at 528-29. The custom of assigning a certificate to a deceased holder's heirs was not always followed and was not guaranteed because the BIA treated the certificates as only conveying a right to use the land, subject to significant restrictions. *See Wolfchild I*, 62 Fed.Cl. at 528-29; *Wolfchild II*, 68 Fed.Cl. at 791.... That discretion was limited in the sense that a certificate of assignment could be issued only to a lineal descendant of loyal Mdewakanton. Otherwise, the Department of the Interior had discretion that could be exercised in a reasonable, non-abusive manner. Accordingly, the dismissal of the

> plaintiffs' claims of breach of legal duty in *Cermak* related to the government's refusal to assign certificates to the heir of John Cermak was appropriate.

Wolfchild v. United States, 72 Fed.Cl. 511, 525 (2006).

Despite the United States' earlier position that a trust existed, it now argues there is no such trust. The Federal Circuit failed to adequately address the topic. Strangely, it relied on the decisions cited above in support of the contention there never was a trust. *Wolfchild v. United States*, 559 F.3d 1228, 1247 (Fed.Cir.2009). In addition, rather than pointing out the United States' position in the various *Cermak* litigation matters, it analyzed statements made by the Interior Department in 1915 to defeat the judicial estoppel argument. *Id.* at 1247-48.

The United States previously argued there was a trust. However, the only analysis provided by the Federal Circuit dealt with isolated statements rather than the specific positions set forth above. *Id.* at 1254-55. The government has successfully argued mutually exclusive positions, a result clearly at odds with *New Hampshire*.

C. The ability to use mutually exclusive arguments resulted in an unfair litigation advantage.

The United States obtained an unfair litigation advantage by arguing mutually exclusive positions. "[A]bsent any good explanation, a party should not be

allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4477, p.782 (1981).

> Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.

28 Am. Jur.2d Estoppel and Waiver §74, at 498-99 (2000) (footnotes omitted).

The Federal Circuit failed to address the judicial estoppel argument permitting inconsistent decisions by different Circuits. The result is far reaching unless addressed by this Court. The United States, or any other litigant, will be allowed to seek an unfair advantage by adopting a position that is beneficial to one Circuit proceeding and then adopt an entirely opposite position in another Circuit proceeding. The courts in the history of dealing with the trust created by the 1863 Act and the Appropriations Acts were manipulated by the United States. Different positions have been taken to satisfy the particular need at the time. This Court should accept the petition to redress this wrong.

The Panel's decision to reverse on the issue of the existence of a trust prior to 1980, literally obliterates

the rights of the lineal descendant beneficiaries instead of following the intent of Congress to *enhance* those trust rights with the 1980 Act. The three communities had no preexisting trust rights by themselves without the lineal descendants, to enhance. This determination by the Panel is a clear error of law and a clear abuse of discretion, and should therefore be reversed.

CONCLUSION

Respectfully, Petitioners would like to share a story with the Court, that hopefully, may help the justices view things through an alternative lens. This is the story:

> Years ago, white settlers came to this area and built the first European-Style homes. When Indian people walked by these homes and saw see-through things in the walls, they looked through them to see what the strangers inside were doing. The settlers were shocked, but it makes sense when you think about it: windows are made to be looked through from both sides. Since then, our people have spent many years looking at the world through your window. We hope today we've given you a reason to look at it through ours.

This story ... the lineal descendants' story ... needs to be heard. This Honorable Court is the hope of justice for the Indian people.

Respectfully submitted this 6th day of November, 2009.

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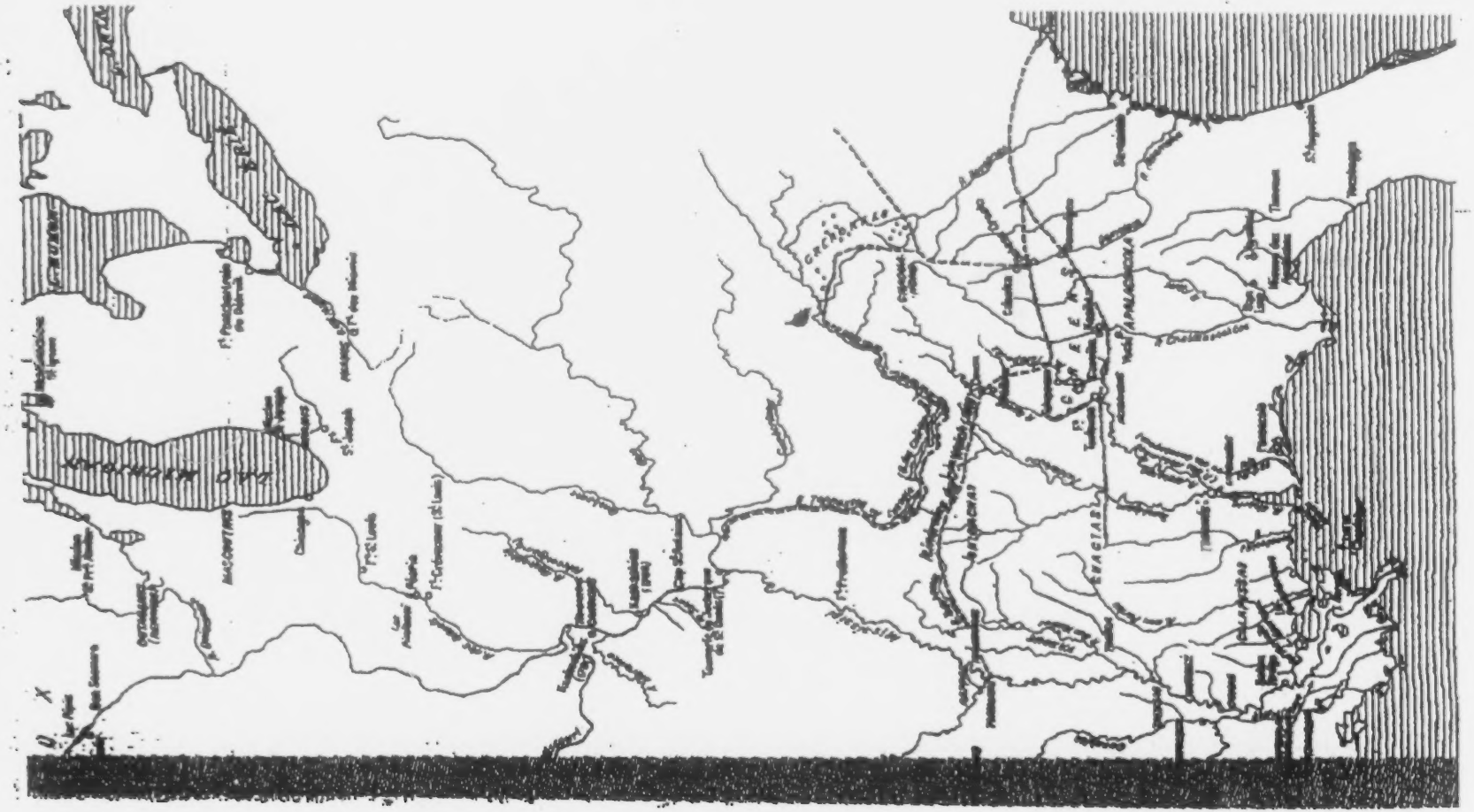
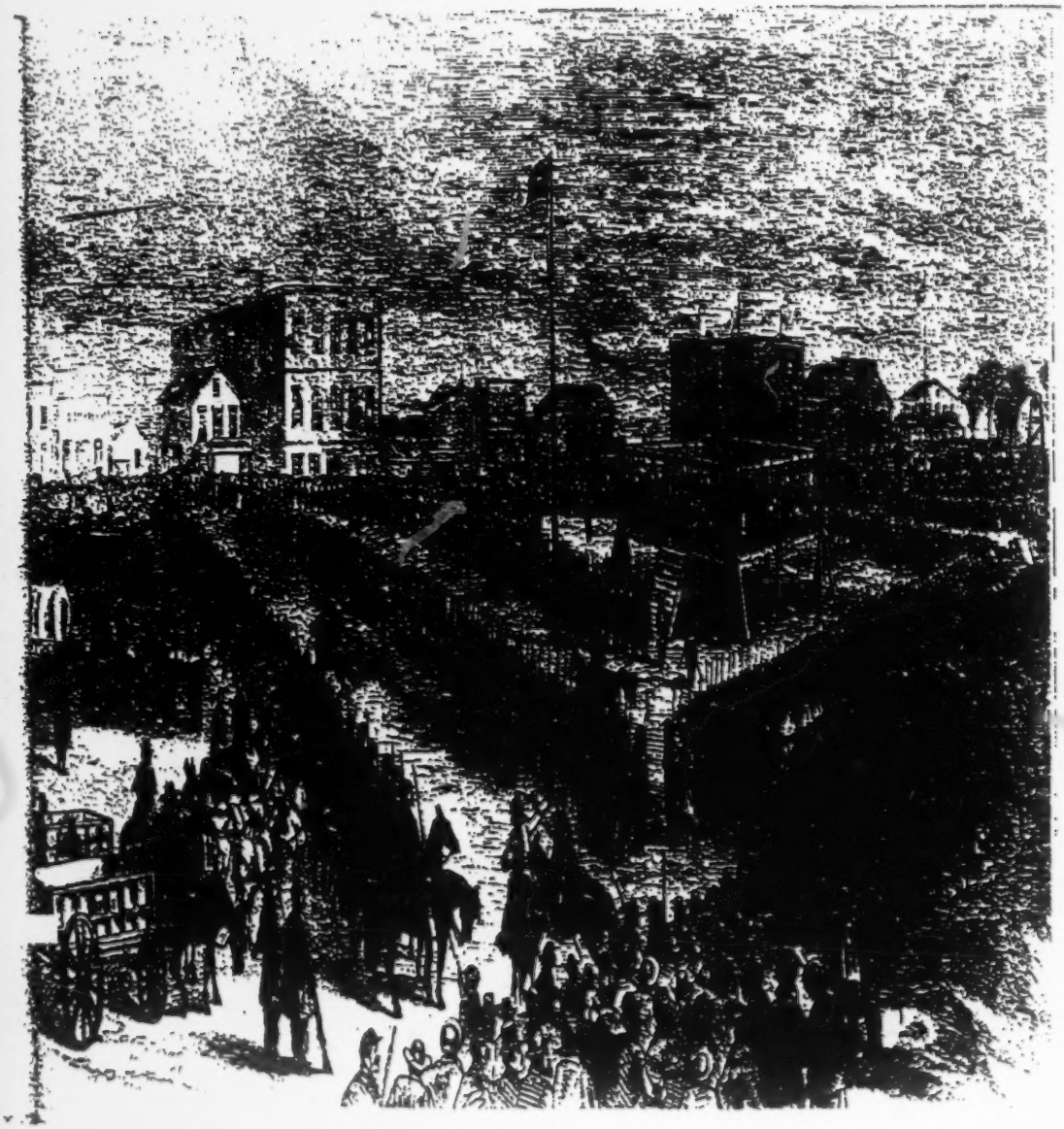
IN THIS DISMAL FENCED ENCLOSURE *on the Minnesota River below Fort Snelling, the uncondemned Sioux prisoners spent a miserable winter in 1862-63. Many died, and many became Christians.* PHOTO BY B. F. UPTON, 1862.

BEST AVAILABLE COPY



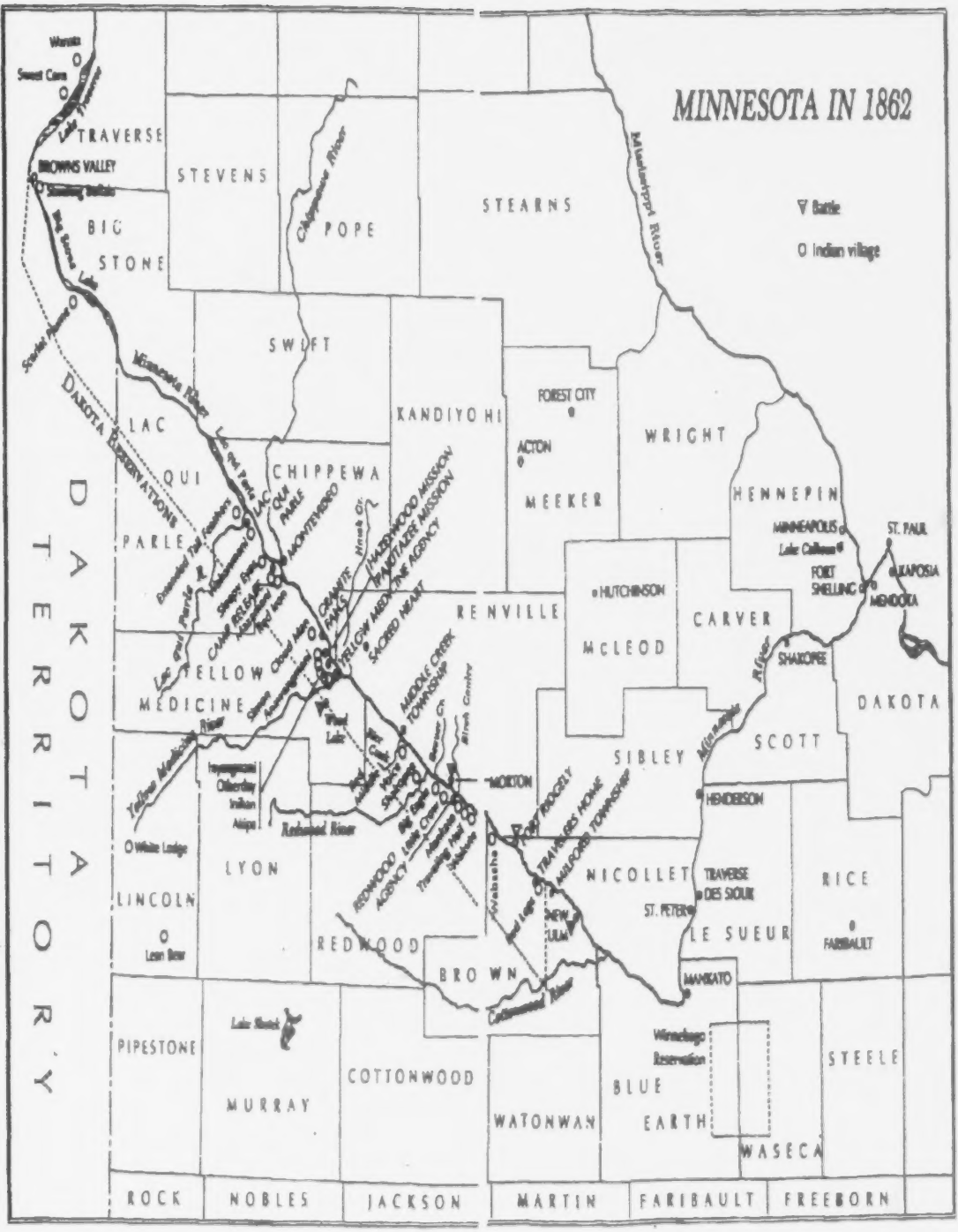
PEMBINA
ITASCA
MAHKAHTA
WAHNAHTA
DAHKOTAH
WABASHAW
IOWA
MINNESOTA
TERRITORY
showing the
ORIGINAL COUNTIES
1849-1851
SCALE OF MILES

THIS MAP *shows where the various splinters of the Dakota people settled or were imprisoned after the 1862 uprising.* MAP BY ALAN OMINSKY.



THE HANGING *of thirty-eight Sioux at Mankato on December 26, 1862, was witnessed by ranks of soldiers and crowds of civilians. Martial law was declared in the town to prevent violence.* DRAWING BY W. H. CHILDS FROM *Leslie's Illustrated Newspaper*, JANUARY 24, 1863.

App. 6


MINNESOTA IN 1862
Battle
Indian village
DAKOTA TERRITORY
TRAVERSE
BROWNS VALLEY
STEVENS
POPE
STEARNS
BIG STONE
SWIFT
KANDIYOHI
FOREST CITY
ACTON
WRIGHT
MEEKER
HENNEPIN
LAC QUI PARLE
CHIPPEWA
MINNEAPOLIS
ST. PAUL
FORT SNELLING
MENDOTA
HUTCHINSON
RENVILLE
McLEOD
CARVER
SHAKOPEE
DAKOTA
YELLOW MEDICINE
SIBLEY
SCOTT
MORTON
HENDERSON
LYON
NICOLLET
LE SUEUR
RICE
FARIBAULT
LINCOLN
REDWOOD
BROWN
MANKATO
PIPESTONE
MURRAY
COTTONWOOD
WATONWAN
BLUE EARTH
WASECA
STEELE
ROCK
NOBLES
JACKSON
MARTIN
FARIBAULT
FREEBORN

NORTHERN SUPERINTENDENCY.

* * *

Allow me to urge, in behalf of these people, that immediate orders be given to provide them with tents, so that they can have them on their arrival at their new homes, or as soon after as practicable. As before stated, they deserve the fostering care of our government.

I met with Senator Wilkinson yesterday, stated some facts to him, and he remarked: "The Winnebagoes deserve to be handsomely treated; they ought to be properly cared for."

One object in stating the number is as to the bill of transportation and subsistence en route, as well as data for your instructions to provide for the latter at their new homes.

A question will arise, as a precautionary act, whether their arms shall be restored to them. Their arms have been boxed, and the names of the owner labelled with a card. Colonel Crooks is strongly opposed to their being restored, and suggests that their value be given in some useful articles. From a conversation with Agent Balcomb I think he entertains the same opinion.

Another question arises, resulting from the recent scalping by the Winnebagoes of three Sioux Indians, whether these tribes ought not to be located some distance apart. I regard it as worthy of careful consideration. At present the Winnebagoes will outnumber

the emigrated Sioux, but the incident will travel among the entire tribe of the latter, and difficulties not otherwise anticipated may ensue. From the best information I can obtain, it appears that the Winnebagoes were incited to the act, thinking it would propitiate them in the kind regard of their Great Father at Washington, and, as a consequence, that they would be permitted to remain in Minnesota.

Very respectfully, your obedient servant,

CHARLES E. MIX

Hon. WILLIAM P. DOLE,
Commissioner of Indian Affairs.

No. 156.

HEADQUARTERS DISTRICT OF MINNESOTA,
DEPARTMENT OF THE NORTHWEST
St. Paul, Minn., May 26, 1863.

SIR: General Sibley has instructed me to enclose to you a copy, which you will find herewith, of a list of the Sioux Indians and half-breeds in camp at Fort Snelling, under the *surveillance* of the United States military authorities during the winter. The list was made December 2, 1862. There was a considerable number of deaths in the camp after the list was made out. Nearly fifty of the acquitted men, prisoners from the Mankato prison, were added to the number after the opening of the navigation. The families are mostly those of the condemned Indians now in confinement near Davenport, Iowa. The families of the half-breeds

who have land entered with their scrip on the Minnesota river, and of others with some reliable Indians who have been kept for use as scouts to the expedition about to take the field, were not despatched with the main camp to their new homes on the Missouri river.

Very respectfully, your obedient servant,

R. C. OLIN
Assistant Adjutant General.

Col. CHARLES E. MIX
Chief Clerk of Indian Bureau, now in St. Paul

FORT SNELLING, *December* 2, 1862.

Agreeably to Special Order No. 45, I herein return the census of the Indian camp, together with an inventory of all property, except such as I regard as strictly the personal effects of families.

NORTHERN SUPERINTENDENCY.

Census of the Indian camp, &c.

Heads of families.	Number in family.	Horses.	Oxen.	Wagons.	Chains.
WABASHAW'S BAND.					
Wabasha.....	8	1	2	1	1
Cauhipiyaha.....	5	2	2	2	1

Wahauhdiata	5	...	2	1	1
Okisemaya	5	...	2	1	1
Winona Tonka	6	...	2	1	1
Icazuntewin	3	...	2	1	1
Tiniyakpanin	8	...	2	1	1
Dowauhdinape	6	...	...	...	...
Hupaydinayiuwe	7	...	...	...	...
Towauhdiuapiwin	4	...	...	...	...
Hapun	7	...	...	...	...
Hupahu	4	1	...	...	...
Liyowin	5	...	...	...	...
Tukannapunwin	8	1	2	1	1
Wicinyan	3	...	...	...	...
Cegabuwtiwin	4	1	2	1	1
Jakiwiwina	7	...	...	...	...
Wahpiyadutewin	4	...	1	...	...
Hdoniciuin	6	1	...	1	...
Winona Dutuwin	4	...	2	1	1
Tokahewin	4	...	...	...	...
Tatehuihewin	9	1	...	...	...
Magasinawin	2	...	2	1	1
Hapaw	5	...	2	1	1
Tawicin	6	2	...	...	...
Wospi	6	...	2	1	1
Tahaya	9	...	...	...	...
Hotawinna	3	...	...	...	...
Kapopewin	5	...	...	...	...
Muhpiyahdegawin	5	...	2	1	1
Wenona	2	...	2	1	1
Total	165	10	31	17	15
PASSING HAIL'S BAND.					
Wasnhiyaydaw	7	1	2	1	1
Tatebota	8	3	2	1	1
Hapaunau	6	1	...	...	...

Tiojaujauwin	7	1	...	...	...
Saiciyidun	12	1	...	1	...
Taputadertawin	3	...	2	1	1
Waste	3	...	...	...	...
Tahaupuaya	5	...	2	1	1
Hapistina	4	...	...	...	...
Cauhdiska	5	...	...	...	...
Hugautudwin	5	1	...	1	...
Hapaunau	2	...	...	...	...
Siiyatukawin	2	...	...	...	...
Heyaka	12	3	1	1	1
Pejihunta	7	1	...	1	...
Ninahnihdiwin	13	1	...	...	...
Zitkadauzawin	2	1	...	...	...
Tukanokiyewin	7	...	...	...	...
Hazawin	3	1	...	1	...
Hapau	5	1	2	1	1
Mahpiya	8	...	...	...	...
Hapestin	6	...	...	...	...
Nahpiyawicusta	3	...	...	...	...
Wenona	4	...	...	...	...
Waudisunwastawin	7	...	...	...	...
Tatekinunhiyayewin	5	1	...	1	...
Tasinatowin	7	...	...	...	...
Wakaukoyakewin	3	...	...	...	...
Hapun	5	...	...	...	...
Ogo	6	...	2	1	1
Hoksidan	6	1	...	1	...
Mazaynhayankewin	8	1	...	...	...
Munowakunhdewin	5	1	...	...	...
Mazanoupawin	3	...	...	...	...
Total	193	20	13	13	7

EAGLE HEAD BAND.					
Huijapa	7	...	2	1	1
Mahpeyahdakinyamuns	7	...	...	...	...
Chehdupasaampsun	2	1	2	2	1
Kahdawin	10	1	...	...	...
Iyaheyahewin	4	...	1	1	1
Touaka	7	...	...	...	...
Hapaupaye	2	2	...	...	...
Haza	11	...	...	...	...
Cauwiyawa	7	...	...	...	...
Cauhdeyayewin	2	...	...	...	...
Tawospin	3	...	...	...	...
Tasmamayawin	2	...	2	...	...
Anpitawastewin	8	1	...	1	...
Paksiksau	6	1	2	1	1
Tamaza	7	...	2	1	1
Wakauhditanunwin	2	2	...	...	...
Oyiwastewin	3	...	1	1	1
Wicauhpukoyakewin	4	1	...	...	...
Tatehonunwin	4	...	2	1	1
Tapita	1	...	...	...	...
Wiyuhamani	10	...	2	1	1
Total	109	9	16	10	8
RED LEG'S BAND.					
Husasa	5	1	2	2	1
Pepe	4	1	...	1	...
Hopi	5	2	...	...	...
Iyotaukewin	7	...	2	1	1
Wakaunaw	7	...	...	...	...
Hepau	6	...	...	...	...
Iyehyawin	6	1	...	...	...
Haza	5	1	...	...	...
Payahiyaewin	5	1	...	1	...

Mazaiyotawkewin	3	...	2	1	1
Winona	3	...	...	...	...
Ptesanwin	7	1	...	...	...
Caundeshamaza	5	...	...	...	...
Hazadutawin	4	...	...	...	...
Naypeya	7	...	...	...	...
Suman	3	1	...	...	...
Hopau	4	...	...	...	...
Aupctuhiyawin	7	...	...	...	...
Wakamauewin	2	1	...	...	...
Mazaahdiyahdum	4	1	...	...	...
Wakauhdiotawin	6	1	...	...	...
Wageininmapewin	2	1	...	...	...
Intekiyewin	2	...	...	...	...
Zitka	2	...	2	1	1
Mahpiuicasnawin	3	...	...	...	...
Tukanahawpewin	4	...	2	1	1
Wakinyanokiyiban	8	...	...	...	...
Wospie	2	3	2	1	1
Tukanyahpewin	5	2	...	...	...
Total	133	18	12	9	6
WAKUTE BAND.					
Wakute	9	3	3	2	2
Tonwauota	7	1	2	2	1
Wakawapewin	4	...	...	...	...
Wiuyaunau	6	...	...	...	...
Hapau	3	1	2	1	1
Owaca	6	...	...	...	...
Na-gi	3	2	...	...	...
Tatecinwin	4	...	...	...	...
Susu	2	...	2	1	1
Waci	5	...	...	...	...
Mahpiyadzahan	7	...	...	...	...
Upauhdeyuwin	4	1	...	...	...

Kaiyowazewin	5	1	...	...	...
Tasinatowin	8	1	...	...	...
Wauhdaka	7	...	2	1	1
Oicayewin	6	1	...	...	...
Waktehuihdewin	9	...	...	1	...
Wmyaunau	7	3	2	2	1
Wpaunau	13	...	...	...	...
Zitkadaansakoyakin	9	2	...	...	...
Mahpiyatankewin	9	1	...	1	...
Aupehdewin	10	...	...	...	...
Tiakunwindewin	11	...	...	...	...
Cauku	9	1	...	1	...
Wakauhdisnau	7	1	2	1	1
Winona	5	1	...	...	...
Cusuawin	7	1	...	...	...
Tunagedutawin	4	...	...	...	...
Kaupiskapewin	7	...	...	...	...
Kampeskadau	10	...	...	...	...
Wakauhdiyotaukewin	7	2	...	...	...
Takunheca	6	...	...	...	...
Itewakeuhdewin	5	...	...	...	...
Total	221	24	15	13	8
BLACK DOG'S BAND.					
Napesni	5	1	2	2	1
Mazaiojinejanwin	2	...	...	...	...
Aupetuiyotaukwin	2	...	...	...	...
Ptanhiyewin	1	...	...	...	...
Tokuhewin	3	...	...	...	...
Hotow	5	1	...	...	...
Winona	3	...	...	...	...
Kamdecamwin	1	1	...	...	...
Mahpiyazuwin	2	...	...	...	...
Saleyopahdwin	4	...	...	...	...
Hapan	4	...	...	...	...

Sasinawakan	3	...	...	...	...
Wicauhpudutawin	4	...	...	1	...
Ihawayakupin	4	1	...	1	...
Owankatowin	5	...	...	...	...
Aupu	1	...	2	1	1
Iciyahupewin	2	...	...	...	...
Cajeyatawin	5	...	2	1	1
Total	61	4	6	6	3
GOOD ROAD'S BAND.					
Wamanonsa	7	1	2	2	1
Tateavatomnau	9	...	...	...	...
Muhtiyadizinin	3	...	...	...	...
Tateyspawastewin	3	...	...	...	...
Ahdatewin	7	...	...	...	...
Ptandutawin	8	1	...	...	...
Makatokicawin	6	1	...	...	...
Hinhewin	4	...	...	...	...
Cepaahdewin	4	...	...	...	...
Hohepetekicawin	5	...	...	...	...
Kampiska	5	...	...	...	...
Hotedan	4	...	2	1	1
Mmaskatewin	7	...	...	...	...
Winode	2	...	...	...	...
Itesuna	3	2	...	...	...
Mahpiyatowin	4	...	...	...	...
Hupecutankawin	6	...	2	1	1
Oyenakisnanin	3	...	1	...	...
Muza	3	1	...	1	...
William Adams	2	...	...	...	...
Yucauniwin	3	...	...	...	...
Total	98	6	7	5	3

TAOPI'S BAND.

Taopi	5	1	2	2	1
Istazano	7	1	...	2	...
Wicinyan	4	...	1	...	...
Wakanhdispa	9	...	...	...	...
Tukanwicasto	6	...	...	1	...
Wastuiaduw	7	1	...	...	...
Makkayewin	6	1	...	...	...
Hakewate	11	...	...	...	...
Weyotanhannan	5	...	...	...	...
Nonpaicago	7	1	...	1	...
Wastemnawin	5	1	...	...	...
Paza	5	2	...	...	...
Wahacaukumaza	8	1	2	2	1
Tatehpiyamam	5	2	...	1	...
Betsey	4	...	...	...	...
Wakinyantawa	8	1	...	1	...
Hunkamaza	5	...	...	...	...
Inkanwayakapi	4	1	2	1	1
Waukinkpe	7	1	...	1	...
Aupenecage	4	...	...	1	...
Sukantoiciye	6	1	...	...	...
Caske	7	...	...	...	...
Mahpiyahdinykin	7	...	...	...	...
Cacetansun	5	1	2	2	1
Dutawin	5	1	...	1	...
Caaohiyayidan	9	...	1	1	1
Winyan	2	...	2	1	1
Kanyisapa	9	...	1	1	1
Mahpiyawakinze	4	1	2	1	1
Nagitopawin	6	...	...	...	...
Hotowhdinape	7	1	...	1	...
Maza	2	1	...	...	...
Susunkemaza	11	...	...	1	...

Wakinyantopa	2	...	1	...	...
Nakadutawin	3	...	...	...	...
Pescaduta	7	...	2	1	1
Total	214	20	18	23	8
YELLOW MEDICINE'S BAND.					
Anawauymana	8	3	2	2	1
Wakonboide	4	...	...	...	...
Fasina	3	1	...	...	...
Wihuke	4	2	2	2	1
Muhpigedan	3	...	...	...	...
Celahgedan	7	2	...	1	...
Winyantoicigewin	1	2	...	...	...
Apahatkawin	3	...	...	...	...
Tukaw	1	...	...	...	...
Nahpiyanayiwin	4	...	...	...	...
Canisotawin	5	...	...	...	...
Wasusnawin	11	1	...	...	...
Kusana	3	...	...	...	...
Yihya	1	...	...	...	...
Sihapakiye	7	...	...	...	...
Waske	2	...	...	...	...
Nayakutemani	5	2	2	3	1
Okihpesin	9	1	...	...	...
Tukan	5	...	...	...	...
Wakanoisedan	3	...	...	...	...
Kaskawin	4	1	...	...	...
Tukanhdviyotukewin	4	...	...	...	...
Dowanmani	6	...	...	...	...
Neteopi	7	2	2	1	1
Hapanan	4	...	...	...	...
Mazaska	5	...	...	...	...
Wcauhpinopa	4	...	...	...	...
Wicacaka	2	...	...	...	...
Inihan	5	...	2	1	1

Kawauke	5	1	3	1	1
Wakanmani	3	2	2	1	1
Upau	6	...	...	...	...
Wakaukadan	4	...	...	...	...
Mahpiwinna	10	2	...	2	...
Satedau	6	...	1	...	...
Peta	7	...	1	1	1
Wkaknhdikoyakiwin	8	1	1	1	...
Muinapewin	4	...	...	...	...
Sizowin	7	...	2	1	1
Oyatenazawin	4	...	...	...	...
Makinapewin	2	...	...	...	...
Supehiya	7	1	2	1	1
Tahaza	5	...	2	1	1
Mahpiyatanini	6	1	...	1	...
Webinukawaste	5	...	...	...	...
Wacaga	5	...	...	...	...
Tonwawetiton	6	1	...	1	...
Totedutewin	8	1	...	...	...
Wiyuha	12	2	...	1	...
Ecetukiya	4	...	...	1	...
Wkakmnapiwin	4	2	...	1	...
Wicauhpiwasecin	4	...	...	...	...
Mahpiyakoyakewin	4	1	...	1	...
Auputusa	12	...	4	1	1
Hapaunan	5	1	2	1	1
Sokecawin	1	1	...	...	...
Mazayonahnwin	3	1	...	...	...
Sucauwasecaunau	6	1	...	...	...
Hapesten	2	...	...	...	...
Total	295	36	29	27	12
HALF-BREEDS.					
John Moore	5	2	2	2	...
Angus M. Robertson	1	...	...	...	...

Gustavus A. Robertson ...	1	...	...	...	...
Thomas A. Robertson ...	2	...	...	...	...
Jane Moore.....	1	...	...	...	...
Joseph E. LaFramboise ..	4	1	2	1	...
Louise Moore.....	3	...	...	...	...
Louise Frenier	2	...	2	1	...
Narcisse Frenier	3	1	2	2	...
Alexis E. LaFramboise .	3	...	...	...	...
Thomas Robinson	2	...	...	...	...
Louison Frenier	8	1	2	2	...
Jack Frasier	1	...	...	...	...
Joseph Lablac	8	...	2	...	...
David Fairebault	1	...	...	...	...
Joseph Monterey.....	2	...	...	...	...
Mary Tussotts.....	1	...	...	...	...
A. D. Campbell.....	8	2	...	2	...
Scott Campbell.....	5	...	...	...	...
Antoine Renville	7	...	...	...	...
Michael Renville	6	1	...	2	...
Gabriel Renville.....	8	...	2	2	...
Charles Crawford	1	...	...	...	...
Frances Roy	8	2	2	1	...
Vetal Boye.....	3	...	...	...	...
Daniel Renville	4	1	...	...	...
Joseph Renville.....	2	...	...	...	...
Rosalie Renville	2	...	...	...	...
Maline Mumford.....	4	...	...	...	...
Alek Graham.....	6	...	...	...	...
Total	112	11	16	14	...
RECAPITULATION.					
Wabashaw's band	165	10	31	17	15
Passing Hail's band	193	20	13	13	7
Red Leg's band.....	133	18	12	9	6
Eagle Head's band	109	9	16	10	8

Wakute's band	221	24	15	13	8
Black Dog's band	61	4	6	6	3
Good Road's band	98	6	7	5	3
Taopi's (farmer) band ...	214	20	18	23	9
Yellow Medicine's band...	295	36	29	27	13
Total full Indians...	1,489	147	147	123	72
Total half-breeds ...	112	11	16	14	. . .
Total in camp.....	1,601	158	163	137	72

It is not intended that the foregoing list shows the real ownership of any property, but merely showing who holds it at present. The "inventory" of live stock cannot possibly be correct, as some two or three horses have died within the last two days. But it is as near correct as practicable.

WM. McKUSICK
Lieutenant, Superintendent of Indian Camp

No. 157

EIGHT MILES ABOVE MOUTH OF CROW CREEK,
On the Missouri river, May 28, 1963.

DEAR SIR: I have examined the river from Fort Randall, and have located here. I have the best place I have seen on the river – good land and timber for this country. I have just landed, and have been so busy receiving goods, &c., until now, and the boat is waiting on me to write this; therefore I cannot make an extended report, but will as soon as I can get my points to describe from. I shall probably from

Campbell creek, up 20 miles, for one set, and from Campbell's creek, down 20 miles, for the other set. I believe this is about the location the Secretary expected me to make; it is the best there is here anyway, so that I hope for your and his approval.

* * *

THE CONGRESSIONAL GLOBE.

January 26, 1863

* * *

[514] reduced to forty acres? It is not probable that the women and children exerted themselves to save the lives of white people, but it was done by chiefs, and heads of families, and young Indians who are styled braves or warriors. I think the provision is well enough as it is. I think we should reward Indians who, under the circumstances that surround this case, exerted themselves to protect the white inhabitants. This was the opinion of the committee – or of several members of the committee, I know – that they ought to be rewarded, ought to be distinguished from other Indians, as an inducement to Indians hereafter, when the tribes should conclude to engage in war with the white people, to frustrate the designs and plans of the tribe, to give timely notice to the settlers. I am not sure, however, but that the word "themselves," in the fifth line of the section ought to be stricken out, and the word "himself" inserted. I submit this to the chairman of the committee.

Mr. DOOLITTLE. I think that would be proper.

Mr. HARLAN. It would then be confined to the men who have thus exerted themselves.

Mr. DOOLITTLE. I have received from the Commissioner of Indian Affairs a statement made by

the head men and braves of some of these Indian tribes, which, with the accompanying certificates, I will read to the Senate:

OFFICE SUPERINTENDANT OF INDIAN AFFAIRS,
ST. PAUL, *December* 24, 1862

SIR: I herewith transmit petition of the Sioux Indians and letter of Agent Galbraith, giving a fair statement of facts as they occurred in my presence.

The Indians whose names appear to this petition have been true and loyal, and should not be punished for the sins of others. They are now without homes or means of earning a living. Their expectations, based upon the risk and danger they incurred in saving the whites in the late outbreak, have not been realized. They supposed the whites would be grateful and provide for them, and ask that their interests may be considered, and that they may not be driven off with the wild or savage Indians, who would treat them as badly as they have treated the whites. They are of the farmer Indians, and could do much towards raising their own living, if allowed to go back to their farms and be protected in their peaceable possession of them, and this should be done in time to allow them to get in their crops in season next spring.

The manner in which they have acted towards the whites ought to entitle them to a reward over and above their benefits arising from their treaty stipulations. They manifest

a desire to do anything or go anywhere the Department may direct.

Very respectfully, your obedient servant,

CLARK W. THOMPSON,
Superintendent Indian Affairs.

Hon. William P. Dole,
Commissioner Indian Affairs,
Washington, D. C.

SIOUX AGENCY, *December* 19, 1862.

SIR: In regard to the petition of Sioux chiefs and soldiers now under the protection of the military at Fort Snelling, which is herewith submitted, I have to say, what you know, that it is a voluntary matter on their part, and sets forth in their way their wishes and desires.

The situation of these men is a peculiar one. Not only are they generally *innocent*, but most of them have by their acts exhibited a friendship for the whites, and a moral and Christian fortitude, provocative of sincere admiration. They cannot go with the *wild* Indians again by any means, and such is the hatred towards their race engendered by recent atrocities, that our white citizens cannot be persuaded to allow them to stay among them. Thus their situation is a hard one, one which it is hard for persons not directly cognizant of the facts to realize. Six or seven of them, indeed, have made such a reputation

as to insure for them the respect of every white man and woman who *know* them. But then all do not know them, and to those who do not know them they are but "Ingins," and are subjected to all kinds of indignities, even to threats to take their lives. These thus well known, but not sufficiently to protect them, are *Aer-pater-to-kec-ha*, (Other Day;) *Maza-ku-ta-marie*, (Paul;) *Lorenzo Laurence*, or *Towar-ta-to*; *Ana-wab-ma-ni*, (Simon;) *Wusoo-ho-wash-tay*, and *Ka-war-kee*. Beside these, *Taopi*, *Wabasha*, *Chaska*, (who saved Spencer,) *Pay-pay*, *Red Iron*, *"Ohe Jims Son,"* *A-kipa*, *Wa-ke-au-washle*, *Chetan Shure*, (known as the Baby,) and perhaps ten others who were good in their way and entitled to particular mention, are comparatively but little known. They feel keenly and realize their situation, and their feelings have induced the petition, and when the petition was read to them they agreed to it, and authorized Colonel Crooks, yourself, and myself to add what we pleased to it. By this authority I do, then, add this: "These men are the representatives of the Sioux of the Mississippi. They have made no forfeit, but are entitled to rewards. They place themselves on the mercy of the Government and ask protection and whatever treaty rights they retain by this petition, they submit to the *discretion of the Secretary of the Interior*."

I submit the petition with remarks such as I have made and ask that you will, with such explanatory remarks as you see proper,

refer it to the serious consideration of the Department.

Respectfully, your obedient servant,

THOS. J. GALBRAITH,
United States Agent.

CLARK W. THOMPSON, Esq.
Superintendant Indian Affairs, St. Paul

We, chiefs and head men of the Mindewakantons and Wahpetons and Sissetons, Sioux of the Mississippi, make this book (petition) to our great Grandfather, the President of the United States:

Last August our young men all broke out and butchered a great many white men and women and children. The cause that they did this was that many of us had commenced to live as white men, and they were jealous of us; and on that account they went to war. We who make this book felt bad for this, and opposed it; but we were few, and they were many, and we could not prevent them. We did all we could. We did not go to war. We killed nobody. We helped to save the captives, and we succeeded in saving nearly three hundred white women and children, and Other Day saved our agent's family and all the whites at the Yellow Medicine, sixty-two in all. Paul, or Mazakutamarie, and Lorenzo, and Anawabmani, or Simon, also saved many white women and children.

We did no harm, and tried to do good. We know our young men, and many of our

old men, have broken the treaty, and we all feel bad. We are farmers, and want that our great Father would allow us to farm again whenever he pleases, only we never want to go away with the wild blanket Indians again; for what we have done for the whites they would kill us. We of the Upper Sioux would like to go to live on the Couteau des Prairie, fifteen miles west of Big Stone lake, in Dakota Territory; and we of the Lower Sioux would like to go back on our farms, and there live as white men, or we would like to live among the white men, and farm as they do, if they would let us.

We think we ought to be dealt with as our great Father does with his white children: the bad ought to be punished, and the good to be well treated. All the Indians who were engaged in killing the white men and women and children should be hanged; but we who did not do bad hope to live and we ask our great Father to let us live and to aid us. We think we have not forfeited out annuities or other funds, because we have done no wrong; and we ask that out great Father will use so much as belongs to us, in such way as to him seems best for our good, to help us to live, and as much as belongs to the bad Indians we would like to have our great Father pay our just debts out of; and it is in right that the white people who have lost all their

property should be paid out of the money which was the Sioux.

We humbly and respectfully ask that our great Father take pity on us and do as he thinks best for our good. We must have food and clothing, and in the spring somewhere to live. Last spring our agent brought us a great many plows and hoes and iron and other things, and we want that he should pay for these things out of our money. We want everything we owe paid.

We respectfully ask that our great Father appropriate our annuity money, and that of those whom we represent, first, to pay our debts created by our agent, Major Galbraith; second, to pay damages; and last, to aid us in getting a living. We are here at Fort Snelling, forty-one Lower Sioux Indians, and twenty Upper Sioux Indians, and about fifteen hundred women and children, and twenty half-breed men. We know not what to do, and we submit ourselves into the hands of our great Father.

WABASH-A, Chief,
CONGEPRY-ON-HA,
WAK-AUB-DE-OTA,
OKIS-AMUZA,
WA-KUTE, Chief,
WAK-AWH-DESNA,
HU-SHA-SHA, Chief,
PAY-PAY,
BU-YA-PA,
Chief acting for Shak-apee's band,
MAR-HE-YA-HOLCKEN-YOU-MANE,
Chief, acting for Shak-apee's band,
SHOTE-AN, Chief, acting for the
Shak-apee's band,
TA-OPI, Chief of Farmer Indians,
WA-KEN-Y-AN-WAX-TO,
WAKING-ANTUEVA,
AN-PE-DE-CURE,
CE-TAN-X-UN,
TON-K-AN-WE-CUX-TE,
MARPEY-A-WUKOUZE,
KAN-KE-SA-PA,
WAU-HINKPE,
WAK-AUHDESUPA,
WA-HA-CUN-K-A MAZA,
TONK-AN-TO-I-CI-YE,
TON-K-AN-WAN-YA-K-APE,
HAKEWAXTE,
WASU-HE-YA-YE-NA, Chief,
TATE-ROT-A,
WAM-ANU-S-A,
TA-TOO-TA-MA-IN,
WE-YU-HA-MANI,
WAK-ANMANE, Chief,
AHNAWABMANE, Chief,

Their X marks.

CITANH-DERA,
INNEH-AN, Chief,
XUPENEYON,
NITE-OPE,
MA-ZA-KU-TI-MA-RI, or PAUL,
AN-PE-TU-TOCE-CA,
or OTHER DAY, Chief

Witness:
THOMAS J. GALBRAITH, *Sioux Agent.*
JOHN P. WILLIAMSON.

HEADQUARTERS SIXTH REG'T MINNESOTA VOLS.,
FORT SNELLING, *December* 18, 1862.

I certify that I am personally acquainted with the Indians who have signed the foregoing petition. As president of the military commission that tried the Sioux prisoners, I had occasion often to meet these men. I consider them true hearted. They are, indeed, but few; but nevertheless they deserve all that the Government may grant them. They should be kindly dealt with and liberally rewarded. I certify to the signatories attached to this petition.

WILLIAM CROOKS,
Colonel Sixth Regiment Minnesota Volunteers.

I hereby certify that the Indians whose signatures are attached to the above petition, applied to Superintendant Thompson and Agent Galbraith for leave to make a book or petition to the President of the United States

through me. That said superintendant and agent met said Indians in council on the 17th instant, and that the Indians then and there dictated to me the foregoing petition; that it is a fair and just translation of what they stated, made by me; that after I had written it out in the English as above, I read it to them twice in their own language in presence of Rev. John P. Williamson, a Dakota missionary, and of the agent, superintendant, Colonel Crooks, and other persons, civil and military, at the headquarters of Colonel Crooks, at Fort Snelling; that said Indians all understood it, and publicly assented thereto in my presence, and authorized me to sign their names thereto, except Other Day (An pe-tu-toce-ca) and Paul (Ma-za-ku-ti-ma-ri,) who wrote their own names. I further certify that Wa-ba-sha, Wa-ku-te, Ta-o-pi, Wasu-he-ya-ye-na, Hu-sha-sha, and Ru-ya-pa, are chiefs, and represent the Lower Sioux, and that Other Day, Wa kan-mor-ni, An-a-wat-ma-ni and I-ni-ha-in are chiefs, and represent the Lower Sissetons and Wahepetons, and the others are all full-blood Indians of both Upper and Lower Sioux, who were throughout friendly to the whites.

ANTOINE FRENIERE,
United States Interpreter.

December 18, 1862.

I desire to say one word, as I am on this point, about breaking out of this Indian war, to show that, in my opinion, our Government has entered upon a

policy in reference to the Indian tribes, which is utterly wrong. Down to 1851 whatever annuities or presents we made to the Indian tribes we made to the chiefs, and then the chiefs made the distribution; and so long as the chiefs held the money, and the blankets, and the ammunition, and the rifles, the young men would look up to the chiefs; but after 1851, we entered upon the policy that the Government agents should distribute all our annuities among the individual Indians, and what was the necessary result? An individual Indian would look down upon his chief and say, "I am just as good as you are; I deal with the great Father himself, through his agent; I get my money, my blankets, my rifles, my ammunition, direct from the Government; you have no control over me." The result of it has been the breaking down of the tribal authority of the chiefs in those nations and the breaking down of their form of government among themselves, so that the chiefs no longer restrain the young men, and they go into war. Since 1851, more depredations have been committed by the Indian tribes than through the whole history of the Government before.

In my opinion, it has grown as much out of that as out of any other one fact, that the Government itself has broken down their tribal organization by making this distribution among the individuals. Here are, among the chiefs and the old men of the tribes, many that endeavored to restrain the young men from going to war in Minnesota. I think it will be good policy for us to offer to give to these persons one

hundred and sixty acres of land each, and to pay fifty dollars a head to them so long as they live, for rescuing the people of Minnesota and saving their wives and their daughters from massacre, or, what is a thousand times worse than death itself, from being ravished by these brutal monsters, as many of them were during that savage warfare. It is doing no more than we ought to do; and I think that the section, as proposed by the committee, ought to stand, giving to the individual Indian the one hundred and sixty acres and a pension of fifty dollars a year for his life.

Mr. FESSENDEN. I shall move to strike out the part that relates to pensions. That is introducing an entire new system. Whatever is given, I hope will be given in the shape of land.

Mr. RICE. The President, in his recent message to Congress, called the attention of Congress particularly to the subject of remodeling the Indian laws, and I have been waiting very patiently for the Committee on Indian Affairs to introduce a bill for that purpose. A vital change is absolutely necessary. So long as we in out treatment of the Indians violate a positive injunction of Holy Writ, or induce them to violate it, they will continue to die out. I believe the good book says that man shall earn his living by the sweat of his brow. Every inducement possible is held out to the Indians by this Government not to work. If you were to take citizens from the eastern States, and put together one or two hundred of them, or one or two thousand, on the plains, and treat them as treat the Indians, in five years they would become savages

themselves. There is no inducement held out to the Indian to labor. He lives

* * *

Ed-Stats.
A H
Delinquent
census, 1919

DEPARTMENT OF
THE INTERIOR

UNITED STATES
INDIAN SERVICE

Indian Training School,
Pipestone, Minnesota,
November 12, 1919.

The Commissioner of Indian Affairs,

Washington, D. C.

My dear Sir:

I have the honor to acknowledge receipt of Office letter dated November 6th, calling upon me to furnish a census of the Indians under my jurisdiction on or before November 20th. I regret that I am unable to comply with the Office's request, for the following reason:

These Indians are scattered about over the southern half of Minnesota, living in groups in Scott, Goodhue, Wabasha, Dakota, Ramsey, Redwood and Yellow Medicine counties, mostly. None of these communities is nearer than seventy-five miles from Pipestone and some of them are more than 200 miles away. It is utterly impracticable for me to canvass this territory for the purpose of making a yearly census and I have been unable to get the information necessary to do so from the local authorities. The Indians themselves will not report births and deaths to me and I have found that the local authorities are not anxious to do so. Perhaps, by sufficient urging,

correspondence and perhaps a substantial fee now and then I could get this information, but I have not time for this either.

The only thing that I can possibly do with the information at hand is to copy the census submitted in 1918, which in itself is merely a copy of former censuses and is incorrect. I am very much disinclined to perpetuate this farce as it can serve no good purpose and is labor lost that is much needed for other purposes at this time. I suggest, therefore, that the matter be held in abeyance until the general census is made in 1920, from which the data necessary may be obtained and compiled. Inasmuch as the law to which the Office refers applies apparently to superintendents in charge of reservations I am of the opinion that it would not apply to this jurisdiction, as this is not a reservation, and as practically all the Indians of it are citizen Indians. I should be glad to have this ruled upon. I await further instructions in the matter.

Very respectfully,

/s/ F. T. Merrit
Superintendent.

FTM.

AFFIDAVIT OF PUBLICATION.

STATE OF MINNESOTA,)
) ss
COUNTY OF RAMSEY)

~~F. DRISCOLL~~ [W.F. Driscoll] *being duly sworn, deposes and says that the annexed printed copy of notice of* Notice to Scouts *was taken from* THE DAILY [and Sunday] PIONEER PRESS, *a newspaper which, during the whole time of publication of said notice hereinafter stated, has been and is printed and published in the City of Saint Paul, County of Ramsey, and State of Minnesota. That the said notice was published in said newspaper for the period of* 15 *successive* [times] ~~*weeks, on _____ of each week,*~~ *commencing on the* 17th *day of* July *1891 upon which day last mentioned it was first published, and ending on the* 31st *day of* July *1891 upon which day last mentioned it was last published, upon which days or times of publication aforesaid the said newspaper was regularly published, and that during the whole time of the said publication he was one of the printers and publishers of the said newspaper.*

/s/ [Illegible]

Subscribed and sworn to before me, this 27th *day of* [Illegible].

NOTICE TO SCOUTS, SOLDIERS AND THEIR DESCENDANTS.

UNITED STATES INDIAN SERVICE.

NOTICE to the members of the Sisseton, Wahpeton, Medawakanton and Wapakoota bands of Sioux Indians who were enrolled and entered into the military service of the United States and served in suppressing the Sioux outbreak of 1862; or who were enrolled and served in the armies of the United States in the War of the Rebellion, and to the members of the families of such of said scouts and soldiers who have died, and who are not parties to the late agreement with the Sisseton and Wahpeton Sioux.

The undersigned will be at the chamber of commerce in St. Paul, Minn. on the 29th day of July; and in Niobra, Neb., on the 11th day of August; and in Devils Lake, North Dakota, 4th day of August 1891, on which dates all the members of the above-named bands, for the families or descendants of such as have died, who are entitled to enrollment, to share in the funds provided by act of congress approved March 8, 1891, and who have not already been enrolled by me are called upon to present themselves or their claims, to me at any of the places named accompanied by proofs of their right to enrollment.

SAMUEL H. ELROD
Special Agent,
Clark, S. D.

Mdewakanton Treaty – treatment of scouts

That for the purpose of paying to the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians who were enrolled and entered into the military service of the United States, and served in suppressing what is known as the Sioux outbreak of eighteen hundred and sixty-two, or who were enrolled and served in the armies of the United States in the war of the rebellion, and are now living, and to the descendants and members of the families of such of said scouts and soldiers as are now dead, who were not parties to the agreement entered into between the United States and the Sisseton and Wahpeton bands of Dakota and Sioux Indians on the twelfth day of December, eighteen hundred and eighty-nine, for the reason that they were not residents of the said Sisseton Reservation and did reside elsewhere, their pro rata shares of the amount found due said scouts and soldiers for annuities under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived by the operation of the provision of the act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredations and injuries by certain bands of Sioux Indians," the whole amount so found due all of said scouts and soldiers by the Department of the Interior, having been appropriated by the United States, to the

Indians residing on the Sisseton Reservation, in and by article three of the said agreement of December twelfth, eighteen hundred and eighty-nine, to the Indians residing on the said Sisseton Reservation, without reference to military service, and the said scouts and soldiers residing off said reservation being thereby deprived of their pro rata share of said annuities for which Congress made provision to the thirtieth day of June, eighteen hundred and ninety, in and by section twenty-seven of the act of March third, eighteen hundred and ninety-one, leaving their share of the annuity of eighteen thousand four hundred dollars due the first day of July, eighteen hundred and ninety, and the first day of July, eighteen hundred and ninety-one, and the first day of July, eighteen hundred and ninety-two, the first day of July, eighteen hundred and ninety-three, and the first day of July, eighteen hundred and ninety-four, wholly unpaid and unprovided for, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, thirty thousand six hundred and sixty-six dollars and sixty-six cents, or so much thereof as may be necessary, to be paid in equal shares and per capita to said scouts and soldiers who are still living, and who are not parties to the agreement aforesaid, and – a share that any such scout or soldier would receive if living shall, in the event he is dead, be divided pro rata between his wife and children and descendants, and the payrolls upon which payments were made to said scouts and soldiers their descendants under the twenty-seventh section of the act March third, eighteen hundred and

ninety one, shall be conclusive in all cases where the name appears upon said rolls, except in cases where deaths have subsequently occurred, and the Secretary of the Interior is hereby authorized to add such other names to said rolls as were previously omitted therefrom by mistakes or omissions of persons who were lawfully entitled to be enrolled thereon

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United States Indian Service,
Birch and Cooley *Agency,*
Morton Minnesota
January 15th, *1896*

To the Honorable Commissioner
of Indian Affairs
Washington, D.C.

Sir

I have the honor to serve herewith late census of the full and mix blood Mdewakanton Sioux of Minnesota taken by me during the months of July 1895 and January 1896.

The total number of mix bloods as mentioned in this census is 520 you will notice that from Page 1 to 10 inclusive parts of 241 Sioux while Page 110 [illegible] starts with 250 [illegible] leaving the actual count to be 512 instead of 520.

I am very Respectfully
your obedient Servant
Robert Henton

United States Indian Service,
Birch and Cooley *Agency,*
Morton Minnesota
July 24, *1896*

To the Honorable Commissioner
of Indian Affairs
Washington, D.C.

Sir

I have full and mix blood Mdewakanton Sioux Indians of Minnesota taken and [illegible] by me the 30th of June, 1896 the number of males above 18 years of age to be 170. The number of females over [illegible] of age to be 268. [Illegible] school children between the ages of 6 & 16 to be 182. [Illegible] with [illegible] out of 21 [illegible] of $60.00 per months. We believe [illegible] the state and [illegible] large bridge they have the advantage of our Public Schools. This Roll has a good many names of individuals that have never participated in any of the distributions that I have made. They being applicants for enrollment since the appropriations have been expended.

INDIAN LAND CERTIFICATE.

No. 64

To all whom it may concern: 411 38

It is hereby certified that John Cermak, *a member of the Mdewakanton band of Sioux Indians residing in Minnesota, has been assigned the following-described tract of land, viz:*

Part of NE1/4 of NE1/4 of Sec. 33, T.115N., R.22W., beginning at the NE corner of said section, thence west 1320 feet, thence South 825 feet, thence east 1320 feet, thence north 825 feet to the place of beginning *in* Scott *County, Minnesota, containing* 25 *acres, more or less.*

It is also certified that the said John Cermak *and* his *heirs are entitled to immediate possession of the said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land. If said land should be abandoned for* two *years by the allottee, then said land shall be subject to assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota May 20, 1886, or a legal descendant of such resident Indian.*

It is also declared that this certificate is not transferable, and that any sale, lease, transfer or incumbrance of the said land, or any part thereof to any person or persons whomsoever, except it be to the

United States, and as herein provided, is and will continue to be utterly void and of no effect. It is further declared that said land is exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress.

In testimony whereof, *I,* William Zimmerman, Jr. *Commissioner of Indian Affairs, have hereunto set my hand and caused the seal of this office to be hereto attached at the City of Washington, D. C., this* 11th *day of* May, *19*[44].

(Sgd) William Zimmerman, Jr.
asst. Commissioner of Indian Affairs

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Sheldon Peters Wolfchild, et al.

Plaintiffs,

vs.

Court File No.:
03-2684L

United States,

Defendant,

and

Jesse Cermak, et al.;
Raymond Cermak, Sr., et al.;
and Michael Stephens, et al.,

Intervenors.

INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO INTERVENE

INTRODUCTION

The proposed Intervenors respectfully submit their Memorandum of Law in Support of their Motion to Intervene. Those Intervenors listed in the Jesse Cermak, Raymond Cermak and Michael Stephens Complaints in Intervention ("Intervenors") are all entitled to intervene in this matter as a matter of right. Plaintiffs' attempt to deny the Intervenors participation in this matter is not based on the previous decisions of this Court or the historical record, but rather on their own interpretation of these decisions and based on their own self-appointed

expert. Given the standard this Court is to employ in determining this Motion, the Intervenors should be allowed to serve and file their Complaints in Intervention.

STATEMENT OF FACT

Prior to reciting the facts entitling the Intervenors to become parties to this matter, it is important to briefly set forth the earlier findings of this Court. This is important due to plaintiffs' contention a lineal descendant must be someone who descends from a name found on the 1886 census, including the 1889 supplement. Pls. Response to Mot. to Intervene at p. 1 (hereinafter "Pls. Response"). Not only is this a distortion of the record, it also distorts the very underpinnings plaintiffs earlier argued to support their causes of action.

Previously the Court set forth a detailed recitation of the history of the 1862 Sioux uprising, and the resulting acts of Congress dealing with the "loyal Mdewakanton." *See Wolfchild v. United States*, 62 Fed. Cl. 521, 526-529 (2004). With respect to the acts of Congress, there are three, of which the last is of primary importance for this Motion. First was the 1888 Act which by its terms related to "the full-blood Indians in Minnesota. . . ." *Id.* at p. 527 n.4 (citation omitted). Second was the 1889 Act which also dealt with full-blood Indians. *Id.* at n.5. The third act, the 1890 Act, "expressly stated that the further

appropriated amount was to support Indians of both 'full and mixed blood.'" *Id.* at p. 527.

Eligibility for those entitled to the benefits set forth in the 1888 Act was based on the census conducted by Walter McLeod, and mailed to the Commissioner of Indian Affairs on September 2, 1886. *Id.* at p. 528. A second census was taken by Robert B. Henton dated January 2, 1889. *Id.* The Court noted in *Wolfchild I* "[t]he McLeod and Henton listings (together, the '1886 census') were used to determine who would receive the benefits of the amounts appropriated under the 1888, 1889, and 1890 Acts." *Id.*

Yet, as a matter of chronology and based on the substance of the Acts, the "1886 census" is not determinative of who was or was not a loyal Mdewakanton. First, the 1890 Act is dated August 19, 1890, after both the McLeod and Henton census. Second, naturally the McLeod and Henton census would not include mixed-blood Indians due to the fact the 1888 and 1889 Act each referenced full-blood Indians. Thus, those individuals who are listed on the McLeod and Henton censuses cannot be an exhaustive list of loyal Mdewakanton. Otherwise, the 1890 Act is of no import, which is clearly not the case.

In *Wolfchild II* the Court recognized the recitation set forth above. "The 1886 census as supplemented by the 1889 census supplies a *presumptive* starting point for identifying the loyal Mdewakanton and their descendants, but these

census rolls may not be definitive. . . . Regarding eligibility and the census rolls, the government has stated its understanding that neither [the 1886 nor the 1889] roll includes the mixed-bloods who were included in the 1890 Act." *Wolfchild v. United States*, 68 Fed. Cl. 779, 787 n.10 (2005) (emphasis supplied). The question, therefore, is not who is mentioned on the 1886 census, but who was left off the 1886 census and the supplement by virtue of the individual being of mixed-blood rather than a full-blood Indian.[1]

The three proposed Complaints in Intervention all have a common ancestor. They also all refer to John Cermak, who held Indian Land Certificates 64 and 65.[2] Land Certificates were given to those

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[1] Plaintiffs are apparently of the belief mixed-blood loyal Mdewakanton are not part of the beneficiary class. They state the 1886 and 1889 census is definitive of those entitled to be a member of the beneficiary class of the three Acts. Pls. Response at p. 2, n.1. Yet, as mentioned above those two censuses do not name mixed-blood members. Plaintiffs obviously have a vested interest in precluding those who are entitled to the benefits of the 1890 Act becoming a party to this litigation. They admit as such by stating "Plaintiffs' counsel and Dr. Barbara Buttes are ascertaining lineal descendants of the original beneficiary class. . . ." *Id.* Original beneficiary class as defined by whom? The plaintiffs? Intervenors are unaware of any Order of the Court appointing Dr. Buttes the final arbiter of who is a member of the beneficiary class. As the historical recitation indicates, the members of the beneficiary class include the descendants of both the full and mixed blood Mdewakanton – which include the Intervenors.

[2] Plaintiffs make reference to the fact John Cermak is not listed on the 1886 Census and therefore is not a lineal descendant. Pls. Response at p. 2. True, John Cermak is not

(Continued on following page)

beneficiaries entitled to an assignment of a portion of the 1886 lands. *Wolfchild I*, 62 Fed. Cl. at 528-529. However, the Land Certificates are only one part of the history with respect to John Cermak, his mother Margaret (Maggie) Cermak and his grandmother Angeline Morand.

Robert Henton did not cease his work with the 1889 supplemental census. After the passage of the 1890 Act, Henton submitted an additional census to the commissioner of Indian Affairs dated January 15, 1896. Att. 2. In his transmittal letter, Henton indicates he is transmitting the census of full and mix blood Mdewakanton. *Id.* For the mixed-blood Mdewakanton, Henton references Angeline Morand at entry 123 and Maggie Churmack (sic) at line 305. *Id.* Angeline is listed as a widow, her husband Amos having died on May 7, 1892. Att. 3. He had lived in Minnesota continuously since 1835.[3] *Id.* Margaret Morand, who later became Margaret (Maggie) Cermak, is listed on the 1865 LeSueur County Minnesota census. Att. 4.

Henton's duties, including the censuses referenced above, included purchasing various items on

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listed on the 1886 Census, the reason being John Cermak was born on February 20, 1896. Att. 1. Julia Cermak, the grandmother of Michael Stephens, was John Cermak's sister. *Id.*

[3] Angeline's death certificate indicates she had resided in Minnesota continuously for 77 years. Att. 1. Thus, the requirement the ancestor be a resident of Minnesota on May 20, 1886 is satisfied. *See Wolfchild I*, 62 Fed. Cl. at 527.

behalf of the Mdewakanton, including land. *Wolfchild I*, 62 Fed. Cl. at 528 n.7. Henton passed away prior to completing his work. In his stead, James McLaughlin was given the authority by the Department of the Interior to make an additional census. Att. 5. In a letter dated February 20, 1899 McLaughlin was instructed to make a "complete census of the Medawakanton (sic) band of Sioux Indians in Minnesota. . . ." Att. 6. Part of his task was to ensure any Indians who were improperly enrolled as members be prevented from receiving additional payments. *Id.*

McLaughlin completed his task in March of 1899. Att. 7. He certified his census by stating: "I certify that the foregoing is a correct census to the best of my knowledge and belief, of the Medawakanton (sic) band of Sioux Indians of Minnesota, numbering 907 persons, including the Mixed-bloods of said band, now residing in Minnesota." *Id.* Maggie Churmack (sic) is the 860th listed person. Her maiden name is noted as Morand. *Id.* John Cermak was the 867th person listed. *Id.*

While not diminishing the importance of the 1886 census and its supplement, the McLaughlin census is actually a more accurate representation of all individuals who were covered by the three Acts at issue. Merely by way of example, John and Mary Crooks are individuals 12 and 13 of the McLaughlin census. *Id.* John and Mary Crooks are the 48th family listed in the 1886 census. John Moose and his wife Harriet are the 240 and 241st individuals listed on

the McLaughlin census. They are the 5th family listed on the 1889 census. Whereas the 1886 and 1889 census only listed those full-blood Indians, the McLaughlin census listed both full-blood and mixed-blood Indians, as required by all three Acts.

The Court referenced an earlier Court of Claims matter involving the tribal lands at issue. *Wolfchild I*, 62 Fed. Cl. at 526 n.2, citing *Sisseton and Wahpeton Bands v. United States*, 42 Ct.Cl. 416 (1907). On January 17, 1924 a roll of those Mdewakanton entitled to share in the judgment was transmitted to the Secretary of the Interior. Att. 8. the transmittal letter states the individuals listed "did not personally take part in the outbreak of 1862. . . ." *Id.* The 389th individual listed is John Cermak, son of Margaret Cermak. *Id.* On March 27, 1995 John Cermak received a letter from the Bureau of Indian Affairs. Att. 9. The letter references the Court of Claims judgment. Mr. Cermak's "right to share the judgment funds was not based upon a blood quantum but through descendancy (direct issue of an ancestor, namely, child, grandchild, great-grandchild, etc.)." *Id.*

Despite the above, plaintiffs state John Cermak "could not identify a parent or grandparent on the 1886 Census – i.e., he was not a lineal descendant." Pls. Response at p. 4. Unfortunately, intervenors counsel was not provided a copy of the attachment purporting to support this fact. However, as indicated above having a parent or grandparent on the 1886 Census is not dispositive of whether someone is a beneficiary of the three Acts. Quite the contrary.

Plaintiffs' claim is not being raised here for the first time. On February 4, 1958 Superintendent W.W. Palmer wrote to Arthur Goodthunder, then Chairman of the Lower Sioux Tribal Council. Att. 10. At a meeting on January 29, 1958 John Cermak's enrollment was questioned. *Id.* As Mr. Palmer states, John Cermak appears on the 1928 Census Roll. It was also noted that in 1944 the Council was informed "John Cermak is a Mdewakanton Sioux and has been carried on our roll for a number of years." *Id.*

To further obfuscate the issue, plaintiffs claim the awarding of the Land Certificate to John Cermak "was in violation of decades of Department of the Interior practice – as confirmed in the government's own documents." Pls. Response at p. 3. First, as demonstrated above, John Cermak was a lineal descendant of an individual entitled to the benefits of the three Acts. As such, he was entitled to the Land Certificates. Second, the documents cited by plaintiffs to support their contention in fact detracts from the contention. Most telling is plaintiffs' Attachment 8.

Attachment 8 is a Memorandum from the Acting Associate Solicitor for Indian Affairs to the Field Solicitor in the Twin Cities. In discussing eligibility, it notes the 1888 and 1889 Acts apply to full-blood Mdewakantons whereas the 1890 Act applies to both full-blood and mixed-blood. Pls. Att. 8 at Bates No. 0041000 n.1. The Memorandum then references the McLaughlin census of 1917. *Id.* at Bates No. 0041001; *see* Intervenors Att. 8. In discussing the 1886, 1889 and 1917 censuses, it was "conclude[d] that there is

no legal impediment to using both the McLeod and Henton rolls by themselves as well as the McLaughlin roll for supportive evidence, to verify ancestry at the Shakopee Indian Community. This is not to preclude the possibility of using other rolls or materials if their contents sufficiently prove that the named individual is a descendant of an 1886 Mdewakanton resident of Minnesota." Pls. Att. 8 at Bates No. 0041001.

Lastly, plaintiffs contend, without authority, that Intervenors have "submitted no evidence of lineal descent – birth certificates or infant baptismal records. . . ." Pls. Response at p. 2. Intervenors at this stage are doing just that – attempting to intervene. At this point in the proceedings the allegations contained in their Complaints are deemed valid. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980). Second, this Court did not require evidence of lineal descent be provided with the Motion to Intervene. True, the Court did say "you should have documentation showing that you are a lineal descendant. Birth certificates or other birth records (such as hospital records, baptismal certificates, or family Bibles) should be provided for each generation, tracing your ancestry back to an individual who was an eligible beneficiary under the trust." *Wolfchild II*, 68 Fed. Cl. at 803. However, there was no requirement the birth certificates be provided

with, the motion to intervene.[4] Yet, so there is no further dispute as to the lineage of the Intervenors in this matter, Attachment 1 contains the birth certificates tracing lineage from the great great grandchildren of Angeline Moran, back to Ms. Moran. The remaining Intervenors are all descendants of these individuals, and if need be, Intervenors would be more than willing to submit their birth certificates as well.

ARGUMENT

The sole question before the Court is whether the Intervenors can intervene in this matter pursuant to RCFC 24(a). As an initial matter, the court is to construe the requirements for intervention in favor of intervention. *Am. Mar. Transp. Inc. v. United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989). The Rule requires a showing of two factors. First, the applicant must claim an interest in the property or transaction which is the subject of the lawsuit. Second, "the applicant is so situated that the disposition of the

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[4] It is presumed plaintiffs did not file birth certificates corresponding to all of the new named plaintiffs in their last Amended Complaint. Instead, they merely recite the allegations previously made as to entitlement to be considered an eligible beneficiary. Plaintiffs do not explain, or provide authority, for the proposition those new plaintiffs have a lesser burden to be included in this matter than do the proposed Intervenors. They cannot because there is no such authority.

action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties" RCFC 24(a).

As noted above, Intervenors have an interest in the property which is the subject of this matter. They are direct lineal descendants of individuals covered by the Acts, as well as descendants of those who were listed on census rolls and were granted a Land Certificate. Plaintiffs' claims to the contrary are based on a narrow interpretation of not only who is covered by the Acts, but by the Court's previous rulings.

If Intervenors were not allowed to intervene the resolution of this action will impair their ability to protect their interests. As this Court noted, "[i]f you choose not to participate as a plaintiff in this lawsuit, any future claim brought by you may be barred by your delay. Furthermore, the court's findings of fact and conclusions of law in this case may be binding on any later claim brought by you." *Wolfchild II*, 68 Fed. Cl. at 802. Plaintiffs' objection to the request to intervene demonstrates the Intervenors' interests are not represented at all by existing parties.

CONCLUSION

For the reasons stated herein, Intervenors respectfully request the Court grant their Motion to Intervene allowing them to serve and file their Complaints in Intervention.

Respectfully submitted,

PIERCE LAW FIRM, P.A.

Dated:
May 25 , 2006

By /s/ Jack E. Pierce
Jack E. Pierce
6040 Earle Brown Drive,
Suite 420
Minneapolis, MN 55430
(763) 566-7200

Attorney for Intervenors

SANTEE SIOUX ROLL
ACT OF MARCH 4 1917 AND
COURT OF CLAIMS JUDGMENT
PREPARED BY
TURIN B BOONE AND IRENE W BASFORD
FIELD INVESTIGATION JAMES McLAUGHLIN
1923

OFFICE OF INDIAN AFFAIRS,
Washington.

JAN 17 1924

The Honorable

The Secretary of the Interior.

Sir:

There is transmitted herewith a roll of Medawakanton and Wakpakoote Bands of Sioux Indians, otherwise known as Santee Sioux, entitled to share in the judgment of the Court of Claims under the jurisdictional act of March 4, 1917 (59 Stat. L., 1195), the relevant portion of which reads as follows:

Upon the rendition of such judgment and in conformity therewith the Secretary of the Interior is hereby directed to ascertain and determine which of said Indians now living took part in said outbreak and to prepare a roll of the persons entitled to share in said judgment by placing thereon the names of all living members of said bands residing in the United States at the time of the passage of this Act, excluding therefrom only the names of those found to have personally participated in the outbreak; and he is directed to distribute the proceeds of such

judgment, x x x x x x x except as hereinafter provided, per capita, to the persons borne on the said roll.

In conformity with the Act, the Court of Claims rendered judgment in favor of said Indians in the sum of $386,597.89, for which Congress made an appropriation by the Act of January 22, 1923 (42 Stat. L., 1163). The Court of Claims fixed the attorneys' fees at 10 per cent of the amount of the judgment, or $38,659.78, leaving $347,938.11 for distribution among the Indians entitled thereto.

A similar payment was made to the Sisseton and Wahpeton Bands under the Act of June 21, 1906 (54 Stat. L., 326), with which the present Act is identical except as to names, dates, etc. The roll for the Sisseton-Wahpeton payment was prepared by Major James McLaughlin, departmental inspector, in view of which, and owing to his familiarity with the location and family history of the Indians Major McLaughlin was also detailed to make up the roll for this payment. After a field investigation of several months Major McLaughlin returned to Washington the latter part of July, 1923, for the preparation of the roll; but unfortunately died a few days later.

The completed roll herewith submitted was therefore prepared in this office on the basis of the records left by Major McLaughlin, verified and supplemented by an exhaustive search of the Santee Sioux annuity and census rolls and other pertinent records here. The roll contains the names of 2,691 persons, all of whom were members of said bands

residing in the United States on March 4, 1917, who did not personally take part in the outbreak of 1852; and it is believed complies strictly with the terms of the Act. The amount ($347,938.11) is distributed as follows: 819 shares at $129.29 each, and 1,872 shares at $129.30 each, aggregating $347,938.11.

It is therefore recommended that the roll be approved; that authority be granted for the payment to the enrollees, per capita, as indicated, in the sum specified above; and that the disbursing clerk of the Department of the Interior be directed to draw checks accordingly.

Respectfully,

/s/ [Illegible]
Commissioner.

Department of the Interior,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, Nov. 29, 1898.

Mr. James McLaughlin,
U. S. Indian Inspector,
Merchants Hotel, St. Paul, Minn.

Sir:

Referring to your detail to make a census of the Medawakanton Sioux Indians, and former correspondence on the subject, you are hereby advised that authority has been granted by the Department for you to employ a clerk to assist you with the work referred to, for such time as may be necessary, at a compensation of $3.00 per day and actual and necessary traveling expenses. Please report the services of the clerk employed under this authority on form 5-252 for approval.

Very respectfully,

/s/ A.G. Tonner
Asst. Commissioner.

GRC

Department of the Interior,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, Feb. 20, 1899.

James McLaughlin, Esq.,
U.S. Indian Inspector,
Present.

Sir:

Under date of November 22nd last, and in pursuance of instructions from the Department relating thereto, the work of making a complete census of the Medawakanton band of Sioux Indians in Minnesota, was placed in your hands in order that the names of all Indians if any, heretofore improperly enrolled as members of said band, might be eliminated from said rolls, and thereby prevented from receiving any further payments. This work having been undertaken by you, was not completed, owing to the fact that you were called away temporarily upon other duties, but I am advised that you will soon return to Minnesota to complete your labors relating to said census.

For the purpose of having certain work in connection with the purchase of land by Mr. Henton for the Medawakanton band of Sioux completed, on or before the completion of the census roll by you, instructions were addressed to Mr. Henton on the 23rd ultimo, to prepare a full and complete schedule of all lands purchased by him for said band of Indians and forward same to this office. Since the date of this letter, this office has been advised of the decease of Mr. Henton.

With the view therefore of having the work, as outlined in office letter above named to Mr. Henton, completed, (copy herewith) you are requested if not incompatible with your other duties, but in connection therewith, to furnish this office with a complete schedule of all lands, purchased by the late Mr. Henton for the said Medawakanton band of Sioux Indians, giving in detail as far as possible the following information viz., 1st date of purchase, 2nd vendor or grantor, 3rd area, 4th cost, 5th subdivision, 6th location, giving section, township, range and county, 7th names of individual Indians to whom said lands have been assigned by late Agent Henton, and also metes and bounds of such assignment where practicable, 8th, value of each piece or parcel of land so assigned. Also any other information relating to these lands that you may deem useful to the office.

For your information I herewith enclose a copy of a letter addressed to Rev. W.H. Knowlton of Redwood Falls, Minnesota, on the 24th ultimo, which gives in substance a statement, – as taken from the records of this office, – of all the appropriations that have been made for this band (Medawakanton Sioux) of Indians, from 1884 up to present time. It also furnishes the names of the different Special Agents that have been appointed from time to time to carry out the instructions of the government relating to these Indians.

There is also enclosed herewith for your information, and also as a guide in making up the foregoing schedule six (6) different plats of land purchased by Mr. Henton for said band of Indians

and forwarded by him October 24 last to this office. After these have served your purpose you will please return them for the files of the office.

In a letter from Mr. Harry Henton (a son of the late Specail Agent) of Morton, Minn., dated 27th ultimo; he states that all the papers &c. of his father have been carefully preserved. It is probable that you may find it necessary, in making up the above named schedule to have recourse to said papers, for which purpose a letter has this day been addressed to said Harry Henton, advising him of this additional work being placed in your hands, and requesting that he will afford you access to such official papers relating to the lands purchased by his father, as shall be found necessary by you.

As you are doubtless aware, the title to all the land purchased by late Agent Henton for said Indians, is still vested in the United States – being held in trust for them – and that in all probability steps will be taken at an early day looking to the allotment of said lands by the Department to such Indians as the late Agent has designated and are entitled thereto, and for this reason particularly as well also as for purposes of verification, this schedule is deemed necessary and important.

Very respectfully,

/s/ A.G. Tonner
Acting Commissioner

C.H.D.

L.

App. 65

Census
-of-
Medawakanton Sioux
-of-
Minnesota

James McLaughlin
U.S. Indian Inspector

March 15th 1899

Approved by Department March 29, 1899
for 14542 March 30, 1899

Census Roll of Medawakanton Sioux of Minnesota, March 15th 1899

ANNUITY PAYROLL

No.		Name		Age	Bal.	Per Capita	Amount Paid	[Illegible]	[Illegible]		Approx. Value	Remarks
[Illegible]	[Illegible]						Blood	Post Office Address				
		Amount Brought Forward										
1	1	Isabelle Neston	✓	69	F		F.B.	Morton, Minn.		26 $^{84}/_{100}$	$530.00	
2	2	Sarah Leith	✓	33	F		F.B.	Morton, Minn.		24 $^{12}/_{100}$	$480.00	
3	3	Walter " " Son	✓	9	M		F.B.					
4	4	James " "	✓	8	M		F.B.					
5	5	Emma " " Daug.	✓	4	F		F.B.					
	6	Ida " "	✓	1	F		F.B.					
												Ida, Daug. Born Feb. of 98
6	7	Nancy Smith	✓	54	F		F.B.	Morton, Minn.		27	$640.00	
7	8	Louise Chaska	✓	45	F		F.B.	Morton, Minn.		20	$400.00	
8	9	Gideon " " Son	✓	50	M		F.B.					
9	10	Winona " Daug.	✓	8	F		F.B.					
12	11	Esther Hart	✓	16	F ✓		F.B.	Morton, Minn.	7	25	$800.00	
13	12	John Crooke	✓	73	M		F.B.	Morton, Minn.	13	20 $^{14}/_{100}$	$1043.00	
14	13	Mary " " Wife	✓	40	F		F.B.	Morton, Minn.				
15	14	Joseph Ironshield	✓	62	M		F.B.	Morton, Minn.		23	$575.00	
16	15	Solan Taopi	✓	40	M		F.B.	Morton, Minn.		28 $^{75}/_{100}$	$718.00	
17	16	Lucy " " Wife	✓	35	F		F.B.					
18	17	Fanny Ross	✓	50	F		F.B.	Morton, Minn.		25	$500.00	
19	18	Samuel Wells	✓	42	M		F.B.	Morton, Minn.		27	$540.00	
20	19	Lucy " " Wife	✓	38	F		F.B.					
22	20	Moses " " Son	✓	13	M		F.B.					
24	21	Mary " " Daug.	✓	10	F		F.B.					
23	22	Amos " " Son	✓	5	M		F.B.					
25	23	Maggie " " Daug.	✓	3	F		F.B.					
21	24	Terry " " Son	✓	2.1	M		F.B.					
26	25	William Columbus	✓	83	M		F.B.	Morton, Minn.		23	$460.00	
27	26	Jane " " Wife	✓	61	F		F.B.					

28	27	Moses Columbus	✓	27	M		F.B.	Morton, Minn.		29 75/100	$595.00	
29	28	Lucy " " Wife	✓	22	F		F.B.					
30	29	Gracie " " Daug.	✓	4	F		F.B.					
31	30	Alice " "	✓	2	F		F.B.					
35	31	Mary Wabasha	✓	70	F		F.B.	Morton, Minn.		23	$460.00	

CONGRESSIONAL GLOBE 1878

* * *

and make suggestions, which work it is to be presumed has been accomplished long ago.

Mr. NELSON. Then there is no permanent appropriation existing for the office of superintendent of Indian schools. There is not such office, technically.

Mr. BLOUNT. That may be very true, but my point is this: You have this provision in this bill; you have a purpose to subserve; practically you are using this officer for other purposes than as an inspector. Therefore why not allow the correction to be made here and designate him as superintendent instead of as inspector?

Mr. PERKINS. If there be no objection, it may be possible for the chairman of the committee to offer as an amendment, in the line of the suggestion of the gentleman from Georgia, the bill which we have reported from the committee creating the office of superintendent. That bill enlarges his powers and duties somewhat.

Mr. BLOUNT. I want to know of my friend if he does not desire to use the person provided for in this bill for the work of superintending the schools.

Mr. PERKINS. Yes, I understand that that is what he is for.

Mr. BLOUNT. Then why not allow him to be so designated?

Mr. PERKINS. I see no objection to it.

Mr. BLOUNT. I submit that no one on reading the bill would suppose that this man had anything to do with the control of the Indian schools. The inspector has limited duties, and in this case they are especially limited, and I do not see how you can charge this person with the additional duties unless you give him the proper designation.

Mr. RYAN. As a mere inspector he is not necessary.

Mr. BLOUNT. Not at all.

Mr. PEEL. If the House desires not to do anything in a permanent way about this matter we might, by consent, take this course. The Senate has passed a bill creating the office of Indian school superintendent. It is a well-draughted bill. It was referred to the Committee on Indian Affairs and was reported to the House by that committee unanimously and is now on the Calendar. It creates the office of Indian school superintendent, and I will say to the House that it is a bill in which the President and the Secretary of the Interior take a great interest, so that if the House desires to create that office and establish it as a permanent matter this is a very good time to do it.

Mr. BLOUNT. Are you not using this person now for this very purpose?

Mr. PEEL. We have styled him in this bill exactly what the law styles him, and the only change

we have made from the phraseology of the last bill is in defining his duties, that he should visit each school once in two years. The remainder of the provision is precisely as it was. Now, why we should call him superintendent, when there is no such office known to the law, I do not see.

Mr. RYAN. I suppose this officer is doing that very duty.

Mr. PEEL. Certainly; he is doing what the law requires him to do.

Mr. BLOUNT. What law does the gentleman refer to?

Mr. PEEL. The law which was read awhile ago.

Mr. BLOUNT. It did not refer to him at all.

Mr. PEEL. It referred to an inspector.

Mr. BLOUNT. It referred to an inspector with certain specified duties; not to this official at all.

Mr. NELSON. Will the gentleman agree that the bill which has passed the Senate, and which we have reported favorably here, may be incorporated in this bill?

Mr. BLOUNT. If it was left to me I would have no objections. I have not offered any amendment; I have simply made a suggestion.

Mr. ROGERS. Mr. Chairman, I suggest to the gentleman in charge of the bill that he ask consent to pass from this section, with the privilege of returning to it, and that hereafter he return and offer as an amendment the Senate bill, which prescribes this officer's duties, gives him a proper name, and gives him a proper salary.

Mr. PEEL. I think the suggestion is a good one, and I will accept it.

Mr. BLOUNT. I hope my friend will allow an inquiry before we pass from this section. I find here a provision that his officer is to be allowed $3 per day for traveling expenses, exclusive of cost of transportation and sleeping-car fare. I wish to know whether the gentleman does not think that $3 per day is ample for traveling expenses of all sorts?

Mr. PEEL. We have followed the last appropriation bill.

Mr. BLOUNT. The gentleman says they have followed the last appropriation bill, but I ask him whether he does not think $3 per day sufficient for traveling expenses?

Mr. PEEL. In some localities it may be and in others it may not.

Mr. NELSON. It would not pay his railroad fare.

Mr. RYAN. The Departments which employ traveling agents usually make the allowance contained in the bill.

Mr. BLOUNT. I think my friend is mistaken.

Mr. PEEL. Let me say to the gentleman [Mr. BLOUNT] that I was in error when I said that this was the allowance heretofore made. It was $4 a day, and the committee cut it down to $3.

The request of Mr. PEEL, that this paragraph should be passed over temporarily, was agreed to.

The Clerk read as follows:

> For subsistence and civilization of two thousand Yankton Sioux, heretofore provided for in appropriations under "Fulfilling treaty with Sioux of different tribes," $25,000; in all $60,000.

Mr. MACDONALD. I have an amendment to offer which has been approved unanimously by the Committee on Indian Affairs, but was not incorporated in the bill because the correspondence with the Department on this subject did not reach the committee in time. I ask the amendment be read.

The Clerk read as follows:

> Insert after the paragraph just read the following:
>
> "For the support of the full-blood Indians in Minnesota, belonging to the Medwakanton

band of Sioux Indians, who have resided in said State since the 20th day of May, A. D. 1886, and severed their tribal relations, $30,000, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands, and in making improvements thereon: *Provided, That* of this amount the Secretary, if he desires it for the best interest of said Indians, may cause to be erected for the use of said Indians at the most suitable location, a school-house at a cost not exceeding $2,000: *And Provided also,* That he may appoint a suitable person to make the above-mentioned expenditures under his direction, the expense of the same to be paid out of this appropriation."

Mr. MACDONALD. Mr. Chairman, I think it is proper I should submit a few words in explanation of this amendment. It has been prepared by the Indian Department, and is submitted by me, because I represent the district of country directly interested; and I might say that nearly all of these Indians are located in the district which I represent.

In the month of August, 1862, our State was the scene of one of the most bloody and destructive Indian wars recorded in the history of our country. Almost the entire tribe of Sioux Indians, then resident within the borders of our State, rose up in arms and made war upon our settlers without a moment's warning along the entire frontier of our State upon

which they could operate, a distance of nearly 200 miles, without a day of a moment's warning to our frontier settlers. I will not attempt to describe the scenes of horror that followed the general onslaught. I must leave that to be imagined. Only those who were there can form any idea of the awful scenes and tragedies that were enacted. It has been well said that the fiends of hell could not invent more fearful atrocities than were perpetrated by the savages upon their victims; that the bullet, the tomahawk, and the scalping-knife spared neither age nor sex, and that but few prisoners were taken except the young women, and a few children. Of the young women, it is needless to say that they would have been fortunate to have met instant death rather than to have had to endure the agonies and tortures to which they were subjected.

In the short space of thirty-six hours from the beginning of the outbreak nearly one thousand whites were cruelly slain, and for nights that entire frontier was lit up by the flames of burning dwellings, barns, stacks of grain and hay, and other property to which these ruthless savages applied the torch. The character of this war and the confidence with which these Indians made the onslaught may be judged from the fact that they attacked in force Fort Ridgely, one of our strongest military posts, and also, in broad daylight, assailed the town of New Ulm.

Our State was then comparatively weak in population and had sent one-half of its fighting men to the Union armies in the South, and the Indians had come

to the conclusion that in consequence of this fact they could recover possession of our State by putting to death or driving out of it all our people. We talk of the horrors of war and its scenes of blood and carnage, but nothing that was ever enacted in civilized warfare can be compared to the horrible and atrocious conduct of these bloodthirsty savages.

Now, when I tell you that all the Sioux Indians did not prove fiends in human form, but that on the contrary a few of them remained friendly to the whites and became their trusted allies and defenders, and that a number of them did valuable service in protecting our people and their property, and in saving many lives, you can understand how grateful we must feel to those true and tried Indians who did us such valuable service. They have ever since had claims upon not only our gratitude but that of the nation at large, which ought long ago to have recognized and partially, at least, compensated for their invaluable services.

But I am sorry to say, sir, that this has not been the case, and that the story of the treatment of these friendly Indians is, in a measure, but history repeating itself. At the time this outbreak occurred these Indians were what we term treaty Indians, located upon the Sioux Indian reservation, in our State, and were entitled to annuities in money and goods and provisions, and had an annual allowance for educational purposes, together with a sum for agricultural and general civilization purposes. By the act of Congress, entitled "An act for the relief of

persons for damages sustained by reason of depredations by certain lands of Sioux Indians," approved February 16, 1863, all treaties with the Sisseton, Wahpeton, Medawakanton, and Wahpakoota bands were declared to be abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States; said forfeiture being made, as stated in said act, in consequence of the war waged by said bands against the white settlers of Minnesota. I am almost ashamed to say it, but the fact is that no exception was made, even in favor of these friendly Indians.

The Indians who are to be the beneficiaries of this appropriation are, as my amendment indicates, members of the Medewakanton band. After this outbreak was suppressed by force of arms and the most guilty punished with the aid of these Indians, in whose behalf I am appealing, they were placed by the Government upon a reservation set apart for them, but these were unable to remain there. Some, in fact, never went upon that reservation, deeming it unsafe for them to do so. By aiding and defending our white settlers they had incurred the hatred and relentless hostility of the "hostiles," and their lives were not safe while they were together. The result has been that these friendly Indians have nearly all long ago severed their tribal relations and taken up their residence among the whites, nearly all of them being located in the district I have the honor to represent.

I should have said that the amount and value of the land and the annuities of this band of Indians, which was so confiscated and covered into the United States Treasury, was about $1,000,000. It will, therefore, be seen that if these Indians secured their share of this money they would receive annually more than this sum proposed by me and be able to support themselves. Naturally enough they do not feel that justice has been done to them; for they are fully aware of the facts just stated by me in relation to the confiscation and sale of their reservation and similar disposition of their annuities. In proof of this fact, I will have read a letter from "Good Thunder," of whom I will let Bishop Whipple – whom you all know – speak hereafter. Before coming here to attend this session, the leading men of these Indians came to see me, and among them "Good Thunder." He pleaded that justice be done his people in this matter, and I advised him, upon his return home, to call upon his missionary (for he is a Christian as well as a hero) or some other friend, and have him write me a letter to submit to the Department in support of an appeal for justice in behalf of his people. He has done so, and I submit it to the candid, thoughtful consideration of the House.

BIRCH COOLEY, REVILLE COUNTY, MINNESOTA,
February 20, 1888.

DEAR SIR: In the matter of the claim of the Medawakanton Sioux, residing in the State of Minnesota, to a pro rata share of the

fund arising from the sale of the Sioux Indian reservations in that State, under the authority of the act of Congress of 1863, we desire to make the following statement of fact, as it appears to us, for your information and advice.

If you shall consider that our claim is well grounded and that the facts and the law are favorable to our view of the matter, we respectfully ask you again to lay it before the honorable Commissioner of Indian Affairs, and, if he be not convinced hereby, to push the matter to an ultimate decision by appeal to the honorable Secretary of the Interior or otherwise, as you shall deem best for our interest.

We desire the matter finally and speedily settled, as it is a constant source of anxiety and bad feeling among our people, who feel that they are being shut out from their hereditary rights, and that their money is being paid out to others in excess of their just claims, and to some who have no right and claim to any benefit arising therefrom.

If the sum were a small one, or if we were in comfortable circumstances, we might remain silent or feel little interest. But the sum in bulk is a large one (nearly if not quite a million dollars), and our own pro rata share would be enough, if expended for land, to make us comfortable for life.

And our needy circumstances are not our fault or choice. We are the people who, when

our tribes revolted or were seduced into war against the United States, were friendly to the whites and fought for them and rescued many prisoners and served until the frontier was cleared of the enemy, us scouts and pickets on the whole western border of Minnesota. All of us, or our fathers, were in such service. On this account we were unable to go to the reservations set apart for various of our bands, or having attempted it, to remain on such reservations. The people, though of our own blood, were hostile to us, and destroyed the property and threatened the lives of such of us as attempted to make residence among them.

We think these things in themselves constitute an apparent and just ground for our claim to our share of the moneys arising from the sale of our own homes.

But beyond this, we think the law and the manner in which it has been administered lie in our favor, and on this ground we make our demand.

The law of 1863, confiscating our annuities and ordering the sale of our lands and homes for our benefit, says that the moneys arising from this sale shall be expended for the benefit of these "Indians in their new homes." If it had said new reservations it might have meant to limit its benefits to reservation Indians, and thus exclude such as did not return to tribal life and so all these friendly soldiers and scouts. But it is

not so worded; it says in their "new homes," not reservations.

Again, it has in one instance at least been interpreted by the Department in accordance with our views. The Indians living near Flandreau, Moody County, Dakota Territory, do not now live and never have lived there on a reservation.

They, like us, have renounced their tribal allegiance and become citizens, and have acquired title to their lands under the homestead laws of the United States as citizens, and yet they have been allowed to participate in the distribution of the moneys arising from the sale of the Minnesota reservation. Moreover, some of them having, as citizens, mortgaged their homesteads, they have been provided money to clear these mortgages by the Indian Office, and they are still applicants for further aid from this reservation fund. The Santees, living in Nebraska, are also living on homesteads, and are still citizens of the State, and yet have received large sums from this fund, and are still applying for further grants.

These facts not only appear, but we consider that the fund has been unjustly administered, not through fault of the law of 1863, but by the interpretation of it in the Indian Office. The parceling out of the fund is the administrative act of the Indian Office, and if error has been made may be corrected in that office.

The reservation in Minnesota was 120 miles long by 10 in width, on the south side of the Minnesota River. Of this land one-half, extending from Rock Creek to the Yellow Medicine River, belonged to the Medawakantonwan Sioux and to the Wahpekutes, both these tribes being now known as Santees, and the upper half of the reservation, extending from the Yellow Medicine River to the Dakota line, belonged to the Sisseton and Wahpeton Sioux. Yet in the distribution of the fund the latter have been allowed more than one-half of the moneys. Moreover, the Santee lands were better lands, and were first sold and brought better prices, and yet no advantage was allowed to accrue to them from these facts.

At Devil's Lake are settled a large number of [Illegible]-heads and other James River Dakota Territory Indians, who had no treaty with the Government, who never lived in Minnesota, and had no rights or interest in and to the Minnesota reservation, and yet they also have been enumerated together with the Sissetons residing there, and been allowed to participate in the benefits of this fund.

Further, the Minnesota Indians had an individual interest in their late reservation, and had under the treaty 80-acre tracts assigned to each family and houses and other improvements. The distribution of this fund should have been equitable as between individuals, every one receiving in some way,

his own proper part and share. It has not been so administered. Certain men and families have received benefits to the amount of hundreds of dollars and others have received nothing. If the record of the office is inspected, it will be seen that large gifts have been made to certain families, say Frazier, Ross, and Hake-waste, and to others nothing at all.

But this is of the past and under another administration of affairs. For the present we claim that the balance of the fund yet unexpended belongs fairly and of right to the Minnesota Sioux, whose new homes are here, and who have been the faithful allies and friends of the Government. We can not rightly be deprived of our interest in the fund arising from the sale of our old homes and farms. And if the Commissioner shall order a hearing or grant us this fund we want it expended only for lands and improvements.

Will you kindly present our cause as forcibly as you can and push it to a final decision. If you need further information or substantiation of our claim we are prepared to furnish it forthwith.

Respectfully,

GOOD-THUNDER, his x mark.

Hon. J. L. MACDONALD, M. C.,
Washington, D. C.

While this letter is couched in the language of an educated person, I know that it is but the substance

of what this Indian would say if he were here, and that he tells his story about as he tells it in the Dakota tongue. There is a sadness that is truly pathetic in this appeal of "Good Thunder" in behalf of his people as well as himself. It will be seen that this letter was not intended for Congress, but for the Indian Department, and is a dignified protest against the fact that their fidelity and loyalty to the whites have been ignored, and that no exception was made in their behalf when the confiscation of the land and annuities of their tribe was made, as was already stated.

I can submit no more eloquent appeal in behalf of these friendly Indians, of more influential testimony as to the character of "Good Thunder," than is to be found in the letter of their warm friend and advocate, Bishop H. B. Whipple:

FARIBAULT, MINN., *December* 9, 1887.

MY DEAR MR. MACDONALD: I write to ask your kind interest in behalf of the scattered Sioux of our State. You know these men are homeless largely on account of their devotion to us during the Sioux war. Their annuities were confiscated and they thrust out of home, while their friendship for us made them afraid to go to the mission. Congress has made appropriations for them twice – the first in money, which was of no use beyond their temporary support. The second was used in part to buy lands, etc., near Shakopee, Red Wing, and Wabasha,

where they secured poor land and had no one to guide them.

Good Thunder, the Christian hero, who was chief of scouts under Sibley, purchased land near their old home. He gave 30 acres for a mission-house, and I have built a mission house, with a room attached, large enough for worship. There are twenty-three families here, and all are industrious and doing well, although some who have only 5 or 10 acres of land ought to have more. The land is good, plenty of timber, and a few miles of grass-land can be had cheap. I believe that if Congress will appropriate $20,000 for the purchase of land, agricultural implements, and to build a school-house not to cost over $1,000, with furniture, books, etc., we remove all of these scattered Sioux and have a model Christian village.

The missionary I have paid myself from my deep love for men who showed much heroism in the war. Will you show this to Judge WILSON, RICE, and other members, and if you will secure this I shall give you all my life-long gratitude. You all know my devotion to this poor people. Many of the infirmities which have made me an old man before my time have been earned in their service. I do honestly believe that these friendly Sioux deserve, as do others, the kindness of the Government. Please all of you try to get this, and our Heavenly Father, who never forgets a deed of love to His poor children, will repay. With kind regards to my

friends, Mr. RICE and Judge WILSON, Mr. NELSON and Mr. LIND.

Your friend,

H. B. WHIPPLE,
Bishop of Minnesota.

In a letter dated January 13, 1878, General Sibley said in relation to this confiscation of the lands and annuities of these Indians:

> I have always regarded the sweeping act of confiscations referred to as grossly unjust to the many who remained faithful to the Government, and whose lives were threatened and their property destroyed as a result of that fidelity.
>
> Having been in command of the forces which suppressed the outbreak, and punished the participants in it, I became necessarily well informed as to the conduct of the bands and the individuals who took part for or against the Government during the progress of the war, and I have repeatedly, in my official dispatches, called the attention of the Government to the great injustice done the former class by including them in the legislation which deprived them of their annuities.
>
> Very respectfully yours,
>
> H. H. SIBLEY,
> [Illegible] *Major-General*
> *United States Volunteers.*

As evidence in support of the fact that this appropriation is recommended by the proper Department of the Government, I submit the following letters relating thereto:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., March 16, 1868.

SIR: I have the honor to inclose herewith copy of a letter from Hon. JOHN L. MACDONALD, member of Congress from Minnesota, together with copy of a letter from Bishop Whipple, in relation to a band of Medawakanton Sioux residing in Minnesota, and respectfully recommend that the inclosed [Illegible] of appropriation be transmitted to the chairman of the Committee on Indian Affairs of the House, and of the Committee on Appropriations in the Senate, with your favorable recommendation, to be added to the Indian appropriation bill now before the House committee.

Very respectfully,

J. D. C. ADKINS, *Commissioner,*
The SECRETARY OF THE INTERIOR.

[Indorsement.]

DEPARTMENT OF THE INTERIOR,
March 17, 1888.

> Respectfully forwarded to the honorable Secretary of the Treasury, for transmission to and for the favorable consideration of Congress.
>
> WM. F. VILAS, *Secretary.*

In obedience to similar appeals Congress last year appropriated $10,000, which was to be used in the purchase of lands and farming implements for these Indians, but because of a failure on the part of the person chosen to expend it to attend to the matter, nearly one-half of it was not used and remains in the Treasury. Consequently, a portion of them did not receive the lands intended to be thereby secured for them, and the Indians did not have the benefit of but little more than half of that appropriation. The object of this appropriation is to further aid these Indians in becoming self-sustaining and adopting the habits and customs of our civilization.

In explanation of the fact that the amendment is presented in this way, I wish to say, in justice to myself and all parties concerned, that I had an understanding with my friend, the chairman of the Committee on Indian Affairs, that I should be notified in time to call upon the Department for the correspondence on this subject, in order to submit it to the committee, but in the press of business the matter was overlooked and the bill reported without this provision.

Mr. BLOUNT. Is it not true that the Indians who were engaged in the hostilities referred to are under later treaties getting annuities now?

Mr. MACDONALD. That is the fact, although these friendly Indians are not receiving their annuities.

Mr. BLOUNT. So I understand; and that makes the case a stronger one for the gentleman's proposition.

Mr. MACDONALD. Yes; it makes it stronger.

Mr. RYAN. Are these Indians under the control of any agency?

Mr. MACDONALD. No, sir; they are nearly all of them located in my district. By an appropriation heretofore made land has been purchased for the majority of them –

Mr. BLOUNT. Are they engaged in agriculture?

Mr. MACDONALD. Yes, sir; and this money is designed to buy horses, cattle, seed, and implements to be used by them in their occupations, which we hope may be the means of their becoming fully civilized. I will state that the money forfeited, which belonged to the tribe of which these Indians were members, amounts to about $1,000,000.

Mr. BLOUNT. They get nothing under treaty.

Mr. MACDONALD. Not a dollar.

The amendment was agreed to.

The Clerk resumed and continued the reading of the bill until the appropriations on page 32, for "miscellaneous supports," had been reached.

Mr. PEEL. I ask now that we go back to consider the matter of the Sioux superintendent. A Senate bill on this subject has received favorable action at the hands of our committee; and I do not think there will be any objection to incorporating in this appropriation bill the measure which is to be offered as an amendment.

Mr. HOLMAN. I think there will be no objection if it be understood that there is to be no increase of the present salary. The duties will be substantially the same as at present – will require no more time for their performance.

The CHAIRMAN. Permission has been given to return to page 6 of the bill. The Clerk will read the amendment when it is sent up.

Mr. NELSON. I now send up to the desk the following amendments for the purpose of having them acted upon as a whole. The first amendment changes the phraseology of the bill as to the title of this inspector of Indian schools and prescribes his duties and compensation; and the latter part of the amendment is offered as a new section 8, and changes the number of the present section 8 to section 9.

I call attention to what I have corrected in the printed bill as the first amendment.

The CHAIRMAN. The latter amendment could not be entertained now.

Mr. NELSON. It is offered as a whole by an understanding already had, and I ask unanimous consent to offer the amendments as an entirety. Unless unanimous consent is given for that purpose I shall not offer them at all.

Mr. HOLMAN. Let the amendments be read, subject to the point of order.

The Clerk read as follows:

Amend line 126, page 6, of the bill to read

"Pay of one superintendent of Indian schools, $3,000.

Strike out the remainder of lines 127, 128, 129, and 130.

Amend lines 131 and 132 to read as follows:

"Traveling expenses of one superintendent of Indian schools, including incidental expenses of inspection and investigation, $1,500."

SEC. 8. That there shall be appointed by the President, by and with the advice and consent of the Senate, a person of knowledge and experience in the management, training,

and education of Indian children to be superintendent of Indian [Illegible] toward civilization and self-support and what changes are such defects as may exist.

It shall be the duty of said superintendent, subject to the [Illegible] Secretary of the Interior, to employ and discharge superintendent [Illegible] any other person connected with such schools, and to [Illegible] regulations for the conduct of the schools as in his judgment [Illegible] schools may require. He shall embody in detail his doings [Illegible] with the reasons for his action in each case, in annual re[Illegible].

The said superintendent shall be allowed and paid a salary [Illegible]num, and, in addition thereto, his actual and necessary trav[Illegible]curred while in the discharge of the duties prescribed by this [Illegible] to be allowed and paid on vouchers approved by the Secretary.

The Secretary of the Interior shall cause to be detailed fr[Illegible] his Department such assistants and shall furnish such [Illegible] necessary to carry out the provisions of this act.

Mr. HOLMAN. I still retain the point of order.

Mr. NELSON. I understood the point of order was [Illegible].

Mr. McMILLIN. These amendments were only [Illegible] formation of the committee.

Mr. BLOUNT. Not at all. The gentleman from [Illegible] unanimous consent some time ago to offer this amen[Illegible] gentleman from Indians [Mr. HOLMAN] said that he [Illegible] less the compensation of the superintendent was reduc[Illegible] if the gentleman modified it he would not object.

Mr. McMILLAN. But no further request for objec[Illegible] the Chair, and that action of the gentleman from In[Illegible] taken as an estoppel of the committee.

The CHAIRMAN. The right to object has not be[Illegible]

Mr. HOLMAN. I think that there is but one fu[Illegible] this –

Mr. BLOUNT. The gentleman from Minnesota [Illegible] these amendments in their proper place, and on objec[Illegible] the question was submitted to the committee. I im[Illegible] too late to raise the objection after the amendment [Illegible] as agreed upon by the committee.

Mr. NELSON. The salary has been fixed, as wi[Illegible] amendment, at $3,000.

Mr. HOLMAN. I wish to call the attention of [Illegible] fact: That on hastily looking at the amendment I [Illegible]tion, which was as to the $4,000 salary. I objected [Illegible] were precisely the

same as those of the predecessor [Illegible] the sum heretofore imposed ever since 1882 – that is, as to the [Illegible] per diem, and traveling expenses; and the approp[Illegible] made was fixed upon that basis; that is to say, that [Illegible] much per diem in addition to the traveling expenses [Illegible].

Now, I think that language ought to be retained i[Illegible]. In all other respects I am satisfied with it.

Mr. NELSON. I desire briefly to explain the amend[Illegible] we may agree upon the general plan of it, and then [Illegible] after it is before the committee. I simply ask that [Illegible] be considered by unanimous consent at this time, an[Illegible] termine if it will be necessary to modify or change [Illegible].

The CHAIRMAN. Is there objection to the req[Illegible] man from Minnesota?

Mr. McMILLAN. I prefer, Mr. Chairman, that m[Illegible] this upon its own merits as an independent propsition [Illegible].

Permit me to state that I favor such appropriation [Illegible] by treaty stipulations; but I doubt very seriously th[Illegible]ing beyond the treaty stipulations in this provision [Illegible].

Mr. RYAN. Perhaps my friend does not understand [Illegible] have already made provision in the bill for such a[Illegible] the pay at $3,000? Now this simply designates the [Illegible] name, and provides how he shall be appointed, and [Illegible]

ties. It seems to me that the legislation is very pr[Illegible] with this provision. If you are to have the officer [Illegible] have a law providing how he shall be appointed and [Illegible] salary shall be, as well as the duties.

Mr. McMILLAN. My friend and I differ only [Illegible] oppose the appointment by the Government of any [Illegible]tion with those schools except such as are required [Illegible]tion with the Indians.

Mr. BLOUNT. The duty of making those appoin[Illegible] of the treaty stipulations. Those funds belong to th[Illegible] used for their improvement, and among other things [Illegible]portant agency for the improvement of the Indians [Illegible].

Mr. NELSON. I desire to explain the reasons for [Illegible]. We have by law technically no authority for a superint[Illegible]. But by the law found in volume 22, Statutes at Large [Illegible]fice of inspector of schools was established; and th[Illegible]rant we have for an official of this kind.

Mr. McMILLAN. That is what I am complainin[Illegible]

* * *

[SEAL] **THE NATIONAL ARCHIVES**
OF THE UNITED STATES
1934
LITTERA SCRIPTA MANET

List of names of members of the Sisseton Wahpeton, Meda-Wakanton, and Wapakoosa Sioux Indians, who were enrolled and entered into the Military Service of the United States and served in suppressing the Sioux outbreak of 1862 and who served in the United States army in the war of the rebellion, and the members of the families and descendants of such of said scouts and soldiers who were not parties to the agreement ratified March 3, 1891 – 26 Stats. 1036.

This list was prepared by J.H. Elrod under instructions from the office of Indian Affairs, which can be found by references to the following noted office letters addressed to him June 6 & 19, July 4, 24, 26, August 4, 11, 13, 20, 21, 22, 24, 26, 28, 31, September 1, October 3 & 15, December 9 & 11, 1891.

Scouts or Soldiers

✓ 49 /s/ Scott Campbell

✓ 50 /s/ Robert Weston

✓ 51 /s/ Pay-Pay [Illegible]

✓ 52 /s/ [Illegible]

✓ 53 /s/ Benjamin Young

54 /s/ Joseph Young

55 /s/ Charles Mitchell

A ROLL OF SIOUX MIXED BLOODS, 1855-56

The ninth article of the treaty of July 15, 1830 at Prairie du Chien with the bands of the woodland Sioux had granted to the mixed bloods of the tribe a tract of land on the west side of Lake Pepin for their permanent settlement and use. However, because of changes in federal policy, the land was never made available for their settlement. After decades of dispute and delay the government, in order to open this tract for general settlement, authorized a special payment to those mixed bloods interested in the tract. In return for their relinquishment of their claims they were allowed scrip to be used for the purchase of other available federal land. On April 10, 1855 the Commissioner of Indian Affairs appointed Harvey H. Johnson and William H. Jones as special commissioners to visit the upper Mississippi valley, take testimony and compile a roll of those who would be qualified by blood to participate in the settlement. The commissioners gathered their information in the fall of 1855 and submitted their report the following February.

The list survives in two apparently contemporary copies among the records of the Bureau of Indian Affairs (RG 75) in the National Archives, Inventory #378. Both copies are in poor condition. The first copy was used as the basis for this transcription with text supplied from the second copy in places where the first was damaged.

Comparison of the information in this list with other material available on some of these families suggests that the commissioners made a serious effort to gather reasonably accurate information. While there are undoubtedly errors, the overall accuracy level seems quite high. It should be remembered though that the main concern of the commissioners was to identify those mixed bloods who were qualified by descent to share in the payment, not to compile a genealogical compendium of the mixed-blood community. There is, however, much genealogical information either stated or inferred, enough to make this roll a useful resource.

Each entry gives the name, age (presumably as of Fall, 1855), fraction of Woodland Sioux blood, the band from which the individual descended, the individual's residence and, for women and children, the name and relationship of the spouse, parent or guardian. It should be noted that the fraction of blood given is only that amount of descent from the bands interested in the treaty and settlement. If a person descended also from another tribe or band (as a fair number undoubtedly did) that degree of relationship is ignored in the calculation.

The supplement and appendix list a number of people who were apparently omitted when the commissioners were gathering their testimony. Others were undoubtedly missed for a variety of reasons, so this list should be considered absolutely complete. It does, however, list the great majority of mixed-blood Sioux in the upper Mississippi valley in the middle 1850's.

SIOUX HALF BLOODS OF MINNESOTA, JOHNSON'S AND JONES REPORT FILED FEB. 23, 1856

Register of the Names of Half Breeds or Mixed Bloods, now living, of the Medanwahkanton, Wahpacouta, Wahpeton and Sisseton Bands of Sioux Indians who Claim Interests in the half breed reservation on Lake Pepin under the 9th Article of the Treaty Concluded at Prairie du Chien of 15th July 1830 as Passed upon by U.S. Commissioners under their Appointment and Instructions of the 10th of April 1855.

	NAME	AGE	%	BAND	GUARDIAN	RES.
1.	Wm. M. Brisbois	16	1/8	Md	Bernard W. Brisbois, F	Wi-PdC
2.	Daniel "	14	1/8	Md	"	"
3.	Emily T. "	12	1/8	Md	"	"
4.	Henry "	10	1/8	Md	"	"
5.	Theophilus La Chapelle	38	1/4	Md	Bernard W. Brisbois, L.G.	"
6.	Pauline Beach	36	1/4	Md	W. of Solomon Beach	In-Vie
7.	Solomon "	2	1/8	Md	S. of "	"
8.	Ursule Ousiace	38	1/2	Md	W. of Charles Ousiace	Wi-PdC
9.	Elizabeth Conklin	6mo.	1/16	Md	D. of Edgar Conklin	Wi-GB
10.	Harriet T. Mitchell	23	1/8	Md	D. of William Mitchell	"
11.	Sophia P. "	22	1/8	Md	"	"
12.	Louisa "	18	1/8	Md	"	"
13.	Charles Pizanne	28	1/4	Md		Mi-Mac
14.	George "	22	1/4	Md		NY-NYC
15.	Louise Moreau	28	1/8	Md	W. of Amable Moreau	Wi-PdC
16.	Isadore "	11	1/16	Md	Amable Moreau, F.	"
17.	Orilie "	8	1/16	Md	"	"
18.	David "	4	1/16	Md	"	"
19.	Virginia "	2	1/16	Md	"	"
20.	Sophia "	1mo.	1/16	Md	"	"
21.	David Goutier	23	1/8	Md		"
22.	Caroline N. "	18	1/8	Md	David Gautier, H.	"
23.	Alexander S. Hooe	23	1/8	Md	Single	Ca-SF
24.	Emilie Hooe	42	1/4	Md	Widow of Lt. Hooe	Wi-PdC
25.	Josephine "	21	1/8	Md	Dr. "	"
26.	Emilie M. "	18	1/8	Md	" "	"
27.	Harriet V. "	15	1/8	Md	" "	"
			*	*	*	
339.	Tashina Langie*	—	1/2	Si	Francis Langie, H.	Mn-LQP
339 1/2	Francis " , Jr.	19	1/4	Si	" , F.	"
340.	John "	17	1/4	Si	" "	"
341.	Sophia "	15	1/4	Si	" "	"
342.	Joseph "	12	1/4	Si	" "	"
343.	Rosilla "	9	1/4	Si	" "	"
344.	Moses "	7	1/4	Si	" "	"
345.	Louis "	5	1/4	Si	" "	"
346.	Madeline "	2	1/4	Si	" "	"
	*Rejected (Full Blood)					
347.	Joseph Decouteau	5mo.	1/2	Md/Wn	Joseph Decouteau, F.	"
348.	Joseph Bird	5	1/2	Md/Wn	" , G. (Stepf.)	"

349. Michael Renville	30	¾	Md/Wn			Mn-YeM
350. Anna "	6	⅞	Md/Wn	Michael Renville, F.		"
351. Mary "	3	⅞	Md/Wn	"	"	"
352. Harriet "	5mo.	⅞	Md/Wn	"	"	"
353. Antoine J. Campbell	29	¼	Wn			Mn-SAg
354. Emilie "	8	⅛	Wn	Antoine J. Campbell, F.		"
355. Celia "	6	⅛	Wn	"	"	"
356. Mary "	4	⅛	Wn	"	"	"
357. Joseph "	1	⅛	Wn	"	"	"
358. Frederick La Chapelle	29	¼	Md	Single		"
359. Antoine "	25	¼	Md	"		Mn-CoR
360. Henry Angi	55	¾	Md			Mn-BSR
361. Mary "	—	½	Md	Henry Angi, H.		"
362. Victoria "	16	⅝	Md	"	, F.	"
363. Harriet "	14	⅝	Md	"	"	"
364. Mary "	12	⅝	Md	"	"	"
365. Nicholas "	10	⅝	Md	"	"	"
366. Josette "	7	⅝	Md	"	"	"
367. Thomas "	3	⅝	Md	"	"	"
368. Infant "	11mo.	⅝	Md	"	"	"
369. Joseph Montreul	50	½	Md			Mn-TdS
370. Lawrence "	16	¾	Md	Joseph Montreul, F.		"
371. Rosilla Dumerce	18	½	Si			Mn-LtR
372. Madeline "	16	½	Si	Francis Dumerce, F.		"
373. Francis "	13	½	Si	"	"	"
374. Alexis "	11	½	Si	"	"	"
375. Jon V. "	7	½	Si	"	"	"
376. Louis Laballe, Jr.	13	½	Si	Louis Laballe, F.		"
377. Margaret "	9	½	Si	"	"	"
378. Peter "	3	½	Si	"	"	"
379. Madeline "	1mo.	½	Si	"	"	"
380. Joseph Renville	44	¾	Md			Mn-LtR
381. Rosilla "	15	⅞	Md	Joseph Renville, F.		"
382. Daniel "	14	⅞	Md/Si	"	"	"
383. Angelic "	10	⅞	Md/Si	"	"	"
384. Agnes "	8	⅞	Md/Si	"	"	"
385. Thomas "	6	⅞	Si	"	"	"
386. William "	4mo.	⅞	Si	"	"	"
387. Anthony Renville	38	¾	Md			"
388. Isaac "	16	⅞	Md	Anthony Renville, F.		"
389. Sophia "	13	⅞	Md	"	"	"
390. Mary "	3	⅞	Md/Si	"	"	"
391. Samuel "	4mo.	⅞	Md/Si	"	"	"
392. John Renville	24	¾	Md	Single		"

393. Gabriel Renville	32	½	Md		"
394. Victor "	5	¾	Md/Si	Gabriel Renville, F.	"
395. Joseph Renville, Jr.	28	⅞	Md	Married. No children	Mn-Red
396. Joseph Laframboise, Jr.	28	½	Si		Mn-LtR
397. Josephine "	20	¾	Md	Joseph Laframboise, Jr., H.	"
398. Madeline "	1	⅝	Md/Si	" , F.	"
399. John "	3	¾	Md	" "	"
400. Alexis Laframboise	16	½	Si	Joseph Laframboise, Sr., F.	"
401. Julia "	14	½	Si	" "	"
402. Jane "	—	¼	Md	" , H.	"
403. William R. "	7	⅛	Md	" , F.	"
404. Justena "	5	⅛	Md	" "	"
405. Eliza	4mo.	⅛	Md	" "	"
406. Francis Laframboise	30	½	Md/Wn	Married	Mo-Riv
407. Louisa Dixon	16	¼	Md	Single	"
408. Scott Campbell	28	¼	Wn	Single	Mn-LtR
409. Mary "	16	¼	Wn	Orphan	"
410. Paul Campbell	26	¼	Wn		Mn-SAg
411. John "	2	⅝	Wn/Si	Paul Campbell, F.	"
412. Baptiste Campbell	24	¼	Wn		Mn-LtR
413. Rosalie "	—	¼	Md	Baptiste Campbell, H.	"
414. John Campbell	22	¼	Wn	Single	"
415. Collin Campbell	60	½	Wn	Married, no children	Mo-LaP

TWO EARLY LISTS OF MIXED-BLOOD SIOUX

The treaty between the U.S. and the Sioux Indians of the Mississippi of September 29, 1837 provided for a fund of $110,000 to be divided among the mixed bloods connected with the tribe. In the summer of 1838 two commissioners, W. L. D. Ewing and S. J. Pease came to the upper Mississippi valley and took testimony, eventually coming up with a list of 200 mixed-bloods which was then submitted to the tribe for its approval. After a few names had been stricken, the list was approved. This list, which is found in the "Special Files" of the U.S. Office of Indian Affairs, no. 200 (National Archives RG 75, Microfilm M574 Roll 59) contains the name, age, degree of Sioux blood and residence of each individual.

The list is important because it identifies individually many early natives of the upper Mississippi River valley and provides for them much detail not usually found otherwise until the 1850 census. The maiden names are given for several married women and the ages appear to be reasonably accurate. The degree of Indian blood should be considered more cautiously as the principal concern was to verify that the applicant had at least ¼ Sioux blood, the minimum required for inclusion. In fact some of the quarter bloods are known from other sources to be ¾ Sioux. Also, because different individuals received differing amounts, various members of a particular family will frequently be found widely separated on the list.

In 1841 James Duane Doty, Governor of Wisconsin Territory, as part of a series of treaties with various bands of the Sioux in the Minnesota area, negotiated an agreement with the mixed bloods to sell a tract of land granted them in an 1830 treaty. The 1841 treaty, which was never ratified, was signed by a number of the mixed bloods. A transcript of this treaty and its signatures can be found in the "Letters Received by the Office of Indian Affairs: St. Peters Agency" (National Archives RG 75, Microfilm M234 Roll 759).

The signers were only a portion of those affected by the treaty, but were probably all the commissioners could induce to sign in the short time available to them. Although the list is therefore quite incomplete, for those families it includes, it does provide useful information such as names of children living at the time, some maiden names and many specified relationships.

These lists are just a sample of the records created by the federal government in its dealings with the various tribes and their mixed-blood relatives, many of which have genealogical value. Since many of the individuals involved appear only infrequently in more commonly used records the Indian records, as these examples show, can be an important additional source of otherwise unrecorded genealogical information. However, much research remains to be done to identify and locate useful material, to bring it to the attention of the genealogical public, and to make it more easily accessible.

Submitted by James L. Hansen, Reference Librarian, State Historical Society of Wisconsin, 816 State Street, Madison, Wisconsin 53706.

REGISTER of Claims under the Second Clause of the Second Article of the Treaty made with the Sioux Indians of the Mississippi, at Washington City September 29th 1837, as passed upon by the United States Commissioners and the Chiefs and Braves the Proper Authorities of said tribe.

	Name	Age	%	Residence
1.	Joseph RENVILLE, Sr.	58	HB	Lac Qui Parle, St. Peters
2.	Scott CAMPBELL, Sr.	42	HB	St. Peters Agency, Fort S.
3.	Augustin ROCK, Sr.	58	HB	Lake Pepin
4.	Pelagie FERREBAULI	55	HB	St. Peters, Fort Snelling
5.	Pelagie LACHAPELLE	54	HB	Prairie du Chien
6.	Francis LABATHE	38	HB	"
7.	Emily HOOE	27	QB	"
8.	Duncan CAMPBELL, Sr.	48	HB	Foot of Lake Pepin
9.	Alexander FERREBAULT	33	QB	St. Peters near Fort S.
10.	Joseph MONTRAVILLE, Sr.	33	HB	Lake Pepin
11.	Joseph RENVILLE, Jr.	28	QB	Lac Qui Parle
12.	Joseph ROCK, Sr.	28	HB	Lake Pepin

13.	Margaret MOOERS	45	HB	Below Fort Snelling 18 mi.
14.	Lucy F. BAILLY	30	QB	St. Peters near Fort S.
15.	Sally Graham CRATT	27	HB	"
16.	Elizabeth ROLETTE	24	QB	Prairie du Chien
17.	Angus M. ANDERSON	27	QB	St. Peters near Fort S.
18.	Samuel J. FINDLEY	20	QB	St. Peters
19.	Duncan CAMPBELL, Jr.	23	QB	Foot of Lake Pepin
20.	Oliver FERREBAULT	23	QB	St. Peters near Fort S.
21.	John B. MOUZEAU	2	HB	St. Croix River
22.	Alexander GRAHAM	17	HB	St. Peters near Fort S.
23.	Joseph PROVENCALLE	20	HB	Traverse des Sioux
24.	John B. LORD	11	HB	St. Peters
25.	Jenny ROBERTSON	25	QB	Below Fort Snelling 18 mi.
26.	Madeline C. RUSICO	18	QB	St. Peters Agency, Fort S.
27.	Nancy Graham BESON	31	HB	"
28.	Susan FRESENIERE	20	HB	Medicine Wood, Pine Bend
29.	Lucy PRESCOTT	11	HB	St. Peters near Fort S.
30.	Therese BRISBOIS	24	QB	Prairie du Chien

31.	Emily FERREBAULT	19	QB	St. Peters near Fort S.
32.	Mary L. TALIAFERRO	11	HB	Mission School, Lake Harriet
33.	Manet M. FERREBAULT	18	HB	St. Peters near Fort S.
34.	Gabriel FERREBAULT	1	QB	"
35.	Jane Ann MOOERS	11	QB	Below Fort Snelling 18 mi.
36.	Madeline MOOERS	8	QB	"
37.	Mary MOOERS	12	QB	"
38.	William DICKSON	45	HB	Vermillion River, Missouri
39.	Jane DICKSON	18	QB	"
40.	Henry ONGI	38	HB	"
41.	Mary Dickson ONGI	22	HB	"
42.	Rosella ONGI	1	QB	"
43.	Benjamin DYOMINE?	19	QB	St. Peters

Angelique OGI, by her father X

M. Ls. C. C. FAREBAULT, Frederick FAREBAULT, Alex FAREBAULT, by their father Bte. FAREBAULT

Elizabeth FAREBAULT by her husband A. FAREBAULT

George FAREBAULT, Agness FAREBAULT, Oliver FAREBAULT by their father Alexr. FAREBAULT

Harriet MANGRE, by her husband Oliver FAREBAULT

David FAREBAULT

Margaret MOOERS by her husband H. MOOERS
John MOOERS, Mary MOOERS,
Jane Ann MOOERS by their father R. MOOERS

Anthony J. FINDLEY

Marie BELLAND by her husband Honore BELLAND

Madeline CAMPBELL
Harriet CAMPBELL
Joseph CAMPBELL
Hippolit CAMPBELL
Battist CAMPBELL & John CAMPBELL by their father S. CAMPBELL
Margaret CAMPBELL

S. J. FINDLEY

Alexander D. CAMPBELL Jr.

Rosalie FRESNIERE X
Angelique FRESNIERE X
Margerite FRESNIERE X
Louis FRESNIERE by his grandfather Francois FRESNIERE

Jos. LAFRAMBOISE Jr.

Bte. FAREBAULT
Pelaji FAREBAULT by her husband Bte. FAREBAULT
Emily R. FAREBAULT

Frozin ST. ANTOINE, Pierre? ST. ANTOINE,
Jos. ST. ANTOINE by their father Charles ST. ANTOINE X

Pauline BRUNSON

Angelique MONTOUR by her husband Jos. MONTOUR

Cath. ROCK by her husband Fr. LAPOINTE

Pierre LA RIVIERE, Michel LA RIVIERE, Isadore LAPOINTE, Xavier LAPOINTE by their father F. LAPOINTE X

Chs. PIZANNE, Emily PIZANNE, George PIZANNE by their guardian H. L. DOUSMAN

Because each entry on the original roll was on two oversized pages, liberal use of abbreviations has been necessary to keep this publication within reasonable bounds. The abbreviations for the bands are as follows:

Md=Mdewakanton; Si=Sisseton;
We=Wahpekute; Wn=Wahpeton.

The abbraviations for relationships are for the most part self-explanatory except for guardians. G. signifies a guardian, frequently a stepparent or other close relative whose guardianship is not recognized legally, i.e. he or she is not court-appointed. L.G. signifies a legal guardian.

Geographic Abbreviations

1.	Ca-SF	San Francisco, Cal.
2.	Da-FtP	Fort Pierre, Dak. Terr.
3.	Ia-Dub	Dubuque, Iowa
4.	Ia-DuC	Dubuque County, Iowa
5.	Ia-WoC	Woodbury County, Iowa
6.	Il-Gra	Grafton, Ill.
7.	Il-Vie	Vienna, Ill.
8.	Mn-Bel	Bellevue, Minn.
9.	Mn-BSL	Big Stone Lake, Minn.
10.	Mn-BSR	Mouth of Big Sioux R., Minn.
11.	Mn-CoM	Mouth of Cottonwood, R, Minn.

12.	Mn-CoR	Cottonwood River, Minn.
13.	Mn-DaC	Dakota County, Minn.
14.	Mn-Far	Faribault, Minn.
15.	Mn-FtD	Fort Douglass, Minn.
16.	Mn-Has	Hastings, Minn.
17.	Mn-HeC	Hennepin County, Minn.
18.	Mn-Hen	Henderson, Minn.
19.	Mn-LeC	Le Sueur County, Minn.
20.	Mn-LtR	Little Rock, Minn.
21.	Mn-LQP	Lac qui Parle, Minn.
22.	Mn-Men	Mendota, Minn.
23.	Mn-Pem	Pembina, Minn.
24.	Mn-Rac	Ramsey County, Minn.
25.	Mn-Red	Redwood, Minn.
26.	Mn-Ric	Rice County, Minn.
27.	Mn-RiL	Rice Lake, Minn.
28.	Mn-SAg	Sioux Agency, Minn.
29.	Mn-ScC	Scott County, Minn.
30.	Mn-Sha	Shakopee, Minn.
31.	Mn-StA	St. Anthony, Minn.
32.	Mn-StP	St. Paul, Minn.
33.	Mn-TdS	Traverse des Sioux, Minn.
34.	Mn-Wab	Wabasha, Minn.
35.	Mn-WaC	Washington County, Minn.
36.	Mn-WBL	White Bear Lake, Minn.
37.	Mn-YeM	Yellow Medicine, Minn.
38.	Mo-ClC	Clay County, Mo.
39.	Mo-LaP	La Platte, Mo.
40.	Mo-Riv	Missouri River
41.	Mo-Stl	St. Louis, Mo.
42.	NY-NYC	New York, N.Y.
43.	Unk	Unknown
44.	Wi-GB	Green Bay, Wis.
45.	Wi-PdC	Prairie du Chien, Wis.

46. Wi-StC St. Croix County, Wis.
47. Wi-IrC Irempealeau County, Wis.

Submitted by
James L. Hansen
Reference Librarian
State Historical Society
of Wisconsin
816 State Street
Madison, Wisconsin 53706

A List of the White persons and Half Breeds delivered at Camp Release Oct. 1862

George H. Spencer Jr.
Mrs. Dr. Wakefield and two children
Mrs. J. W. Earle and two daughters
Mrs. N. D. White and two children
Mrs. Elizabeth Gauthers and one child
1 ✓ Benedict Enne – age ten years
Mrs. Mattie Williams
1 ✓ Mrs. Mary Lison
✓ Mrs. Cook from Lake Shetek
✓ John Wright in charge of Mrs. Cook
3 ✓ August Boos and two sisters
3 ✓ Mrs. Mary Patterson and two brothers
2 ✓ John Smitt and sister
5 ✓ Mrs. Pauline [Illegible] and four children
3 ✓ Mrs. Amalia Lange and two children
3 ✓ Mrs. Estina [Illegible] and two children
6 ✓ Mrs. Theresa Eisensich and five children
3 ✓ Mrs. Sophy Limmas and two children
Jane Ingalls and sister
2 ✓ Nancy Courselle and sister
4 ✓ Harriet Robinett, brother and two sisters
3 ✓ Mrs. Martha Clasan and two children
1 ✓ Mrs. Harriet Adams
3 ✓ Mrs. Matilda Labatte and two children
4 ✓ Mrs. Harriet Valliant and two [three] children
2 ✓ Mrs. Margaret [Illegible] and one child

1	✓	Elizabeth Pecard, sister's child of Mrs. Cardinal
3	✓	Mrs. Antoina LaBlanc and two children
1	✓	[Illegible] Labatte
4	✓	Mrs. Dorothia [Illegible] and three children
2	✓	Mrs. [Illegible] Eindenfeld and child
1	✓	Mrs. [Illegible] Lane
1	✓	Henrietta Kreiger, four years old
1	✓	Mrs. Frances Wochler
		Mrs. Maj. J. R. Benson and eight children
		Mrs. Charles Moir and two children
		Mr. and Mrs. [Illegible] Benson and child
1	✓	Louis Rothman, twelve years old
1	✓	[Illegible], ten years old
1	✓	Henrietta [Illegible], nine years old
1	✓	Solomon Bordah, seven years old
		Mrs. Josephine Huggins and two children
5	✓	Mrs. Mary Woodbury and four children
		Mrs. Sarah [Illegible] and three children
2	✓	Mrs. Lucy Taunt and one child
		George Thompson
1	✓	Mrs. Eunice Wilson
3	✓	Ms. Rosalie McLane and two children
4	✓	Mr. and Mrs. Larramie and two children
		Thomas Robertson
		Mrs. Robertson and three children
		Mrs. Marion Hunter
		Mr. Gabriel Renville and five children
		Charlie Crawford

Mrs. [Illegible] and two children
Mrs. Theresa Renville and three children
Mr. Antoine Renville and three children
Miss Sophia Renville
Isaac Renville
Mr. and Mrs. John B. Renville and child
Mr. Joseph Renville and child
Rosalia Renville and child
David [Illegible] and brother
Mr. and Mrs. Scott Campbell and three children
Mr. Michael Renville and three children
Mr. Labelle and five children
Mary [Illegible]
Charles Mitchel and five children
Lucy Campbell and child
Mr. and Mrs. Joseph Campbell and seven children
Mrs. Finby and boy
Hypolite [Illegible]
Louis Martin, wife and three children
Mr. and Mrs. Joseph Lafromboise and two children
Mary Lafromboise and child
Mrs. Julia [Illegible] 84
Peter [Illegible] and child
Joseph [Illegible] and child
Joseph Martin, wife and three children 5
✓ [Illegible] Charboner
John [Illegible], wife and three children

John Moor, wife and six children
Miss Jeannie Moor
August Robertson
Augusta Robertson
[Illegible] Robinson
Henry Millard
Mrs. Campbell
John Campbell and child
Baptiste Campbell and two children
Celia [Illegible]
Duncan Campbell wife and six children
David Fairbault Jr.
Mick Graham and five children
Mr. David Graham Jr.
Mrs. Nancy Fairbault and child
Mary Josephine Fairbault
Joseph LeBlanc and six children
Joseph [Illegible] and four children

In all – white persons	107		33
Half Breeds	162		63
	269		

Held at Camp Release
Whites v. Half Breeds

Bishop Henry Benjamin Whipple

There was one man in Minnesota who was not swept off his feet by the tide of passion which raged throughout the state. This was Henry Benjamin Whipple, who in November, 1859, at the age of thirty-seven had come to Minnesota as the first bishop of the Protestant Episcopal Church. He was descended from distinguished Revolutionary stock and was richly endowed with bodily and mental gifts. Debarred by infirm health in youth from completing the traditional classical education, he was thrown into business and political relations, which perhaps gave him a better raining for his future work than he might have got from the odes of Horace and Pindar.

If ever a man was fitted for the time and the place, Bishop Whipple was. Tall and strongly built, gracious but not patronizing in manner, he easily won the good will of men of every class and creed. His enthusiasm was tempered by a saving common sense and an abounding humor. He magnified his office, but only to do the greater service to those to whom he was called to minister. He laved all me; he feared no man. He had been in Minnesota but a fortnight when he made an excursion to Fort Ripley to ascertain the condition of the mission to the Chippewa at Gull Lake. The mission had been established some seven years before by the enthusiastic James Lloyd Breck, but he had been suspended in 1857 because of the turbulence of the Indians due to the inundation of fire water which followed the treaties of 1854 and 1855. This journey and its experiences kindled in the heart

of the young bishop an interest in the red man which never abated to the end of his life.

Bishop Whipple informed himself of the condition and prospects of both nations and soon became satisfied that much of their wretchedness was chargeable to the indifference, not to say the rascality, of white men.

[O]n the sixth of March, 1862 Bishop Whipple addressed an open letter to President Lincoln, in which he summarized the iniquities of the Indian system and insisted on the supreme importance of placing the Indians under a government of law, administered by hones and capable men selected for their merit and fitness and not as a reward for political services.

Knowing as he did better than any other man in Minnesota, unless it was Sibley, the operation of the Indian policy and the machinations of selfish and dishonest officials, traders, employees, and half breeds, he was not surprised at the outbreak in August, 1862.

In the fall of 1862 Bishop Whipple was in Washington and, in company with his friend and relative, General Halleck, he called on President Lincoln. In he course of their interview he gave an account of the outbreak, its causes, and the sufferings of the Sioux. That he did this with the force and eloquence of which he was so capable may be inferred from a remark made by the president not long after: "He came here the other day and talked with me about the rascality of this Indian business until I felt it

down to my boots." It is not likely that this impression had faded out when the president came to act upon the findings of the military commission. In December Bishop Whipple published in the St. Paul newspapers a calm, clear statement of the train of events which had led to this terrible explosion. So far as is known, he was the only public man who had the courage to face the whirlwind of popular denunciation of all Indians and of the Dakota in particular. To punish the guilty would avail little if the traditional Indian policy was to be left unreformed. In some quarters the bishop came in for denunciation almost as spiteful and unsparing as that directed against the Sioux themselves, but he never retracted a syllable nor budged an inch. [Folwell, A History of Minnesota, Vol. II]

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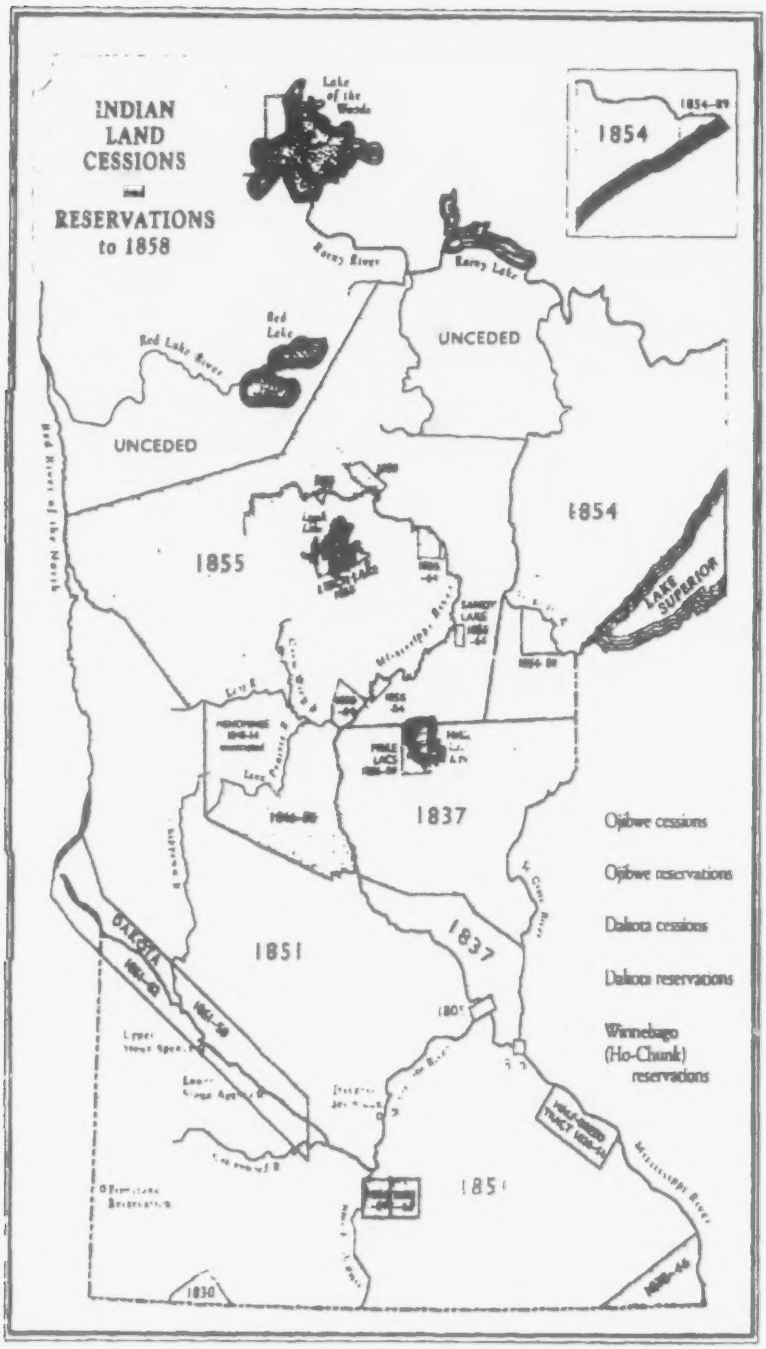
INDIAN
LAND
CESSIONS
and
RESERVATIONS
to 1858
Lake of the Woods
Rainy River
Rainy Lake
Red Lake
Red Lake River
UNCEDED
UNCEDED
1854
1854-55
1855
1854
LAKE SUPERIOR
1837
1851
1837
1851
1851
1837
Ojibwe cessions
Ojibwe reservations
Dakota cessions
Dakota reservations
Winnebago
(Ho-Chunk)
reservations

WASTE OF WARRIORS IN THE WEST. – The State of Minnesota, feeling aggrieved by the Government's slow and humanitarian mode of conducting war against the hostile Indians within her borders, has lately adopted some very decisive but questionable measures of her own for getting rid of the "red devils." A proclamation appeared offering a State bounty for every "scalp" of a Sioux that should be brought in by volunteer and amateur hunters. The document rested upon the official authority of Gov. (now United States Senator) RAMSEY, and greatly shocked some of that gentleman's Eastern friends, who made haste (too much haste it seems) to repudiate the proclamation as a forgery and a slander.

But later accounts confirm the authenticity of the original document, which, however, has since undergone some modification. The hunters of the red-skins are no longer required to produce the scalps torn from the head of the slain victims, but must furnish "satisfactory affidavits" of their exploits in bringing down their human (or inhuman) game. A St. Paul correspondent of a cotemporary gives the Minnesotan view of the subject as follows:

> "Whatever exceptions humanitarians might take to the scalp bounty, they would soon be convinced of the wisdom and necessity of the present order if they would come among us, and expose their own scalps, instead of keeping at a safe distance, and prating about humanity. A 'Moral Minnesotan' is informed that he doesn't need to

> defend Senator RAMSEY from the imputations of issuing the order, as it is an act he is free to acknowledge, and ready to sustain."

It is undoubtedly true that a protracted residence on the Western frontier is fatal to the existence of sympathies once cherished for the "poor Indian." The feud between man and the serpent, begun in the Garden of Eden, is not more implacable than that between a frontiersman and a Sioux. Hence Minnesota will continue, without shame or remorse, to pay bounties for Sioux scalps, as other States pay for wolf scalps. It is a "State right" that will not be given up.

The operations under the State policy are active, and the papers boast, successfull. The correspondence above quoted has this account of the incidents and character of the conflict as now waged under State auspices:

> "Stray Indian horse thieves are constantly being seen and killed along the frontier. Two Indians were surrounded on the prairie a few days since by twelve soldiers, and they fought like tigers. One loaded and fired eight times, and the other four; and they did not fall until one was pierced with eight bullets, and the other with six, any one of which inflicted a mortal wound. A bullet would pass through their bodies without causing them to flinch. The State scouts, and the large bounty offered for those who choose to hunt independently, is resulting in the 'taking off' of numerous red devils, and will prevent the depopulation of the frontier."

A Washington correspondent of the paper from which these extracts are quoted, gave a few days since a very discouraging account of the moral and political condition of these western Indians, and advised that they be mustered quickly into the United States military service, to keep them out of mischief. Unless the Minnesota hunters are checked in their pastime, there will be few recruits left us when we begin to swear in the red-skins.

The New York Times
Published: August 18, 1863
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Nos. 09-579 and 09-580

In the Supreme Court of the United States

SHELDON PETERS WOLFCHILD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

HARLEY D. ZEPHIER, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether three appropriations acts passed in 1888, 1889, and 1890 created a trust for the benefit of certain Mdewakanton Sioux and their descendants.

2. If those appropriations acts created such a trust, whether Congress terminated that trust with the enactment of legislation in 1980 that placed the lands purchased with the appropriated funds in trust for three Indian communities.

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In the Supreme Court of the United States

No. 09-579

SHELDON PETERS WOLFCHILD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-580

HARLEY D. ZEPHIER, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-75) is reported at 559 F.3d 1228.[1] The opinion of the Court of Federal Claims (Pet. App. 76-111) is reported at 78 Fed. Cl. 472. Earlier opinions of the Court of Federal Claims are reported at 77 Fed. Cl. 22, 72 Fed. Cl. 511, 68 Fed. Cl. 779, and 62 Fed. Cl. 521.

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and the petition appendix in No. 09-579.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2009. A petition for rehearing was denied on June 11, 2009 (Pet. App. 112-116). On August 20, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including November 6, 2009, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1862, the Minnesota Sioux revolted against the United States. Pet. App. 6. After the Army suppressed the uprising, Congress annulled all treaties with the Minnesota Sioux and confiscated Sioux lands in the State. Act of Feb. 16, 1863 (1863 Act), ch. 37, § 1, 12 Stat. 652. Some of the Sioux in Minnesota had opposed the revolt. Pet. App. 6-7. Congress permitted those Sioux—known as the "loyal Mdewakantons" because they were affiliated with the Mdewakanton band of the Sioux Tribe—to remain in Minnesota, *id.* at 7-9, and it authorized the Secretary of the Interior to give 80 acres of land "to each individual * * * who exerted himself in rescuing the whites from the late massacre of said Indians," 1863 Act § 9, 12 Stat. 654. The Secretary did not exercise that authority, and the Sioux remaining in Minnesota sank into poverty. Pet. App. 8-9.

In 1888, 1889, and 1890, Congress passed appropriations statutes, each of which included a long series of specifically designated appropriations for the Indian Department, particular Indian Tribes, and other purposes. Act of June 29, 1888 (1888 Appropriations Act), ch. 503, 25 Stat. 217; Act of Mar. 2, 1889 (1889 Appropriations Act), ch. 412, 25 Stat. 980; Act of Aug. 19, 1890

(1890 Appropriations Act), ch. 807, 26 Stat. 336. The appropriated funds included money for the Mdewakanton Sioux in Minnesota. In particular, the 1888 Appropriations Act appropriated $20,000:

> For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations * * * to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands.

§ 1, 25 Stat. 228-229. In the 1889 Appropriations Act, Congress appropriated $12,000:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations * * * to be expended by the Secretary of the Interior * * * [for] the purchase, as in his judgment he may think best, of such lands, agricultural implements, seeds, cattle, horses, food, or clothing as may deemed best in the case of each of these Indians or family thereof.

§ 1, 25 Stat. 992. Finally, the 1890 Appropriations Act appropriated $8,000:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], or who were

> then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, * * * to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof.

§ 1, 26 Stat. 349.

With the funds appropriated by the Appropriations Acts, the Secretary purchased lands in Minnesota, which have come to be referred to as the "1886 lands" because the funds used to purchase them were appropriated for Indians present in Minnesota in 1886. See H.R. Rep. No. 1409, 96th Cong., 2d Sess. 2 (1980) (*House Report*). Beginning in 1904, the Secretary assigned 1886 lands to individual loyal Mdewakantons through "Indian Land Certificates." See *Cermak* v. *United States*, 478 F.3d 953, 954 (8th Cir. 2007). The certificates "convey[ed] only temporary use and occupancy rights to individual Indians" and did not effect allotments under the General Allotment Act, 25 U.S.C. 348. *Cermak* v. *Babbitt*, 234 F.3d 1356, 1363 (Fed. Cir. 2000), cert. denied, 532 U.S. 1021 (2001).

Under the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, three Indian communities—the Lower Sioux Indian Community, the Prairie Island Indian Community, and the Shakopee Mdewakanton Sioux—were formed in the areas where the 1886 lands were located. Lands were acquired in trust for those communities, each of which included descendants of the loyal Mdewakanton who had been assigned Indian Land Certificates for 1886 lands. *House Report* 2, 4; S. Rep. No. 1047, 96th Cong., 2d Sess. 2 (1980) (*Senate Report*).

By 1980, the communities' areas included two types of lands: lands acquired in trust for the federally-recognized communities under the IRA, and 1886 lands assigned to individual loyal Mdewakantons. The communities' bylaws and constitutions "established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the [IRA] and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands." *House Report* 2. The 1886 lands were interspersed among the land held in trust for the communities, "result[ing] [in] a checkerboard pattern of land use[] that severely diminishe[d] the effectiveness of overall land management programs and community development." *Senate Report* 2.

In 1980, Congress placed the 1886 lands in trust for the three communities to simplify and clarify the status of the lands in the communities and remedy the problems caused by the checkerboard of property interests. Act of Dec. 19, 1980 (1980 Act), Pub. L. No. 96-557, 94 Stat. 3262. The 1980 Act provided:

> [A]ll right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [1888, 1889, and 1890 Appropriations Acts], are hereby declared to hereafter be held by the United States * * * in trust for the [respective community].

1980 Act § 1, 94 Stat. 3262. Section 3 of the 1980 Act protected existing assignments: "Nothing in this Act shall (1) alter, or require the alteration, of any rights

under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment." 94 Stat. 3262.

2. Petitioners are individuals who claim to be descendants of the loyal Mdewakanton, and who brought this action in the United States Court of Federal Claims (CFC) seeking damages from the United States. Pet. App. 16. Petitioners argued that the Appropriations Acts created a trust for the loyal Mdewakanton and their lineal descendants that gives them rights to the proceeds of the trust corpus through their status as holders of equitable title to the 1886 lands. *Ibid.* Petitioners assert that the United States breached its trust obligation by failing to ensure that the uses and benefits of the 1886 lands would accrue to the beneficiaries alone and be distributed as equally as practicable among all of the petitioners. *Id.* at 17.

The CFC granted partial summary judgment to petitioners. 62 Fed. Cl. 521. The court held that the Appropriations Acts created a trust relationship between the United States and the loyal Mdewakanton, that the trust relationship extended to the descendants of the loyal Mdewakanton, and that the trust had the effect of bestowing equitable title to the 1886 lands on the beneficiary class. The court reasoned that the Appropriations Acts had "three key features that show the creation of a trust." *Id.* at 541. First, the statutory language directing the Secretary "to expend the appropriated funds for the Mdewakanton 'as in his judgment he may deem best' * * * functionally appoint[ed] the Secretary of the Interior to serve as the trustee." *Ibid.* (quoting 1888 Appropriations Act § 1, 25 Stat. 229) Second, a provision of

the Acts calling for each Indian to receive "an equal amount in value" constituted "a guideline for the trustee." *Ibid.* (quoting 1889 Appropriations Act § 1, 25 Stat. 993). Third, those statutes provided that funds would remain available even if not spent within the fiscal year, thus "aid[ing] in defining the corpus of the trust." *Ibid.*

The CFC also concluded that the 1980 Act did not terminate the trust because it lacked "an explicitly expressed intention by Congress to terminate the trust." 62 Fed. Cl. at 543. The court held that the 1980 Act only transferred the United States' legal title in the 1886 lands, while equitable title remained with the loyal Mdewakanton. *Ibid.* The court acknowledged that its reading created an unusual "trust on a trust," but it left "that possibility and others * * * to exploration in future proceedings." *Id.* at 544 n.13.

3. On a motion by the United States, the CFC entered an order certifying two questions for interlocutory appeal under 28 U.S.C. 1292(d)(2). Pet. App. 76-111. Specifically, the court certified the questions (1) whether the Appropriations Acts created a trust for the benefit of the loyal Mdewakanton and their descendants, and (2) if so, whether the 1980 Act terminated that trust. *Id.* at 96, 107.

4. The court of appeals accepted the interlocutory appeal and reversed and remanded. Pet. App. 1-75.

With respect to the first certified question, the court of appeals concluded that the 1888, 1889, and 1890 Appropriations Acts did not create a trust. Pet. App. 20-35. The court observed that "[t]he simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary

of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries." *Id.* at 22. Noting that "the surrounding paragraphs of the same statutes, which provide for the support of other groups of Indians, are clearly just appropriation provisions that do not create trust obligations," the court reasoned that "[i]t is difficult to read the paragraphs relating to the 1886 Mdewakantons as creating a trust relationship." *Id.* at 23. The court further determined that "nothing in the legislative history" of the Appropriations Acts "indicates that they were designed to create a trust relationship." *Id.* at 26. The court also held that nothing in the Department of the Interior's implementation of the statutes suggested that Congress intended to create a trust in the Appropriations Acts. *Id.* at 32-48.

The court of appeals went on to address the second certified question, concluding that, even if the Appropriations Acts created a trust, Congress terminated that trust in the 1980 Act. Pet. App. 62-75. Under that statute, the court observed, "the United States' interest in the lands [was] converted into a trust for the three communities" in the area where the 1886 lands were located, "whereby the United States would hold legal title to the lands and each of the three communities would hold equitable title." *Id.* at 62-63. The court explained that "the [1980] Act is difficult to understand only if viewed in the way [petitioners] view it—as intended to preserve equitable title to the disputed lands in the 1886 Mdewakanton descendants." *Id.* at 66-67. Instead, the court held that, "[i]f the [1980] Act is viewed as creating a trust in which legal title is held by the United States and beneficial title is held by the three communities, the

wording of the Act achieves that purpose clearly and simply." *Id.* at 67.

ARGUMENT

The court of appeals correctly held both that the 1888, 1889, and 1890 Appropriations Acts did not create a trust and that, even if those statutes did create a trust, the trust was terminated by the 1980 Act. Either of those holdings provides an independent basis for the judgment below, and neither conflicts with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the three Appropriations Acts did not create a trust. Petitioners identify no decision of this Court or any other court of appeals holding to the contrary. Instead, they assert (Pet. 21, 35) that the court of appeals erroneously concluded that the Appropriations Acts did not create a trust because those statutes did not use the words "trust" or "reservation." More generally, petitioners contend (Pet. 32) that the court's analysis conflicts with this Court's "statutory interpretative principles governing Native American trust cases." Such an abstract conflict would not warrant review, and in any event, petitioners' characterization of the decision below is incorrect. As an initial matter, the court of appeals explicitly acknowledged that "a statute need not contain the word 'trust' in order to create a trust relationship," Pet. App. 20, and it nowhere suggested that use of the term "reservation" was a necessary precondition for a trust relationship.

Petitioners' broader criticism of the court of appeals' interpretive approach is similarly flawed. Petitioners rely (Pet. 32-39) on common-law trust principles to argue that the Appropriations Acts created a trust obliga-

tion. But this Court's recent decision in *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009), makes clear that analysis of whether there is a trust obligation must begin with an assessment of whether there is a specific right-creating or duty-imposing statutory or regulatory provision. "*If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a 'conventional fiduciary relationship,' *then* trust principles * * * could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" *Id.* at 1558 (quoting *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 473, 477 (2003)) (brackets in original). Contrary to *Navajo Nation*, petitioners seek to use common-law trust principles to identify the duty-imposing statutory provision and then to infer a conventional fiduciary relationship. As the court of appeals explained, however, the Appropriations Acts did not create a trust or any specific fiduciary obligations. Instead, they were simply ordinary annual appropriations of public funds for the Secretary to expend for the benefit of certain Indians as part of Congress's effort to aid the Mdewakanton in Minnesota following the 1862 uprising. Pet. App. 27.[2]

Petitioners contend that by recognizing that the Appropriations Acts appropriated public funds "subject to a statutory use restriction," the court of appeals necessarily found that the Acts created specific statutory rights for the loyal Mdewakanton and their lineal de-

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[2] Because petitioners fail to identify a specific statutory obligation or duty with the hallmark of a conventional fiduciary relationship, their suggestion (Pet. 33) that the court of appeals erred in failing to apply what they call the "Fair Inference Rule" is incorrect. That rule would come into play, if at all, only at a later stage of the analysis, in determining whether any statutory obligation is enforceable by damages.

scendants. Pet. 21, 33 (quoting Pet. App. 27). To the contrary, the court of appeals explained that the Appropriations Acts' "limited restrictions" on how the Secretary of the Interior was to spend the appropriated funds "are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose." Pet. App. 22. And in any event, while the Acts did provide some restriction on how the Secretary may expend the appropriated funds, each statute gave the Secretary considerable discretion: he was to spend the funds "as in his judgment he may deem best," and even the directive that each Indian receive "an equal amount in value" was to be fulfilled only "as far as practicable." 1888 Appropriations Act § 1, 25 Stat. 229; 1889 Appropriations Act § 1, 25 Stat. 993. That broad discretion is inconsistent with the existence of a specific statutory right in, or duty to, the loyal Mdewakanton and their lineal descendants.

Moreover, the group that was to benefit from the appropriated funds—the beneficiaries of the supposed trust—varied in each of the Appropriations Acts. The 1888 statute referred to "full-blood Indians" who had resided in Minnesota since 1886 and had severed their tribal relations. 1888 Appropriations Act § 1, 25 Stat. 228-229. The 1889 statute referred to "full-blood Indians" who had resided in Minnesota since 1886 "or who were then engaged in removing to said State." 1889 Appropriations Act § 1, 25 Stat. 992. And the 1890 statute referred to "full and mixed blood Indians" who had resided in Minnesota since 1886 "or who were then engaged in removing to said State." 1890 Appropriations Act § 1, 26 Stat. 349. The failure of the Acts to specify a definite and consistent group of "beneficiaries" fatally

undermines petitioners' theory that Congress intended to create a trust for the individual loyal Mdewakanton. Similarly, the failure of any of the Acts to mention heirs or descendants is inconsistent with petitioners' theory that the beneficiaries of the supposed trust would include the lineal descendants of the loyal Mdewakanton.[3]

2. Petitioners suggest (Pet. 30-31) that the decision below is inconsistent with this Court's recent decision in *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), but it is not. *Carcieri* addressed the Secretary's authority under the IRA to acquire land and hold it in trust "for the purpose of providing land for Indians." *Id.* at 1060 (quoting 25 U.S.C. 465). Because the IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," this Court concluded that the statute "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 1060-1061 (quoting 25 U.S.C. 479). As the court of appeals correctly concluded, the Secretary's authority under the IRA is not relevant to the questions raised in this case—whether the Appropri-

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[3] Petitioners assert (Pet. 25) the decision below conflicts with Ninth Circuit decisions "recogniz[ing] that when federal obligations are to be enforced, there exists federal subject matter jurisdiction." But because the court of appeals held that the Appropriations Acts did not create any specific obligation with respect to the loyal Mdewakanton and their lineal descendants, it had no occasion to consider the CFC's jurisdiction to enforce such obligations. For similar reasons, petitioners are incorrect when they suggest (Pet. 24) that the court of appeals held that federal courts lack subject-matter jurisdiction "if Interior's obligations to a definitive class of Indians affect present-day post-1934 IRA non-tribal community governments." The decision below was not based on the purported effect petitioners identify.

ations Acts created a trust and whether, if they did, the 1980 Act terminated any such trust. Pet. App. 53 n.8.

3. In an argument presented for the first time in this Court, petitioners assert (09-580 Pet. 28-31) that a trust was actually created by the 1863 Act, and the Appropriations Acts merely added to that trust's corpus. Petitioners' theory below, by contrast, was that the Appropriations Acts created a trust. See, *e.g.*, Pet. C.A. Br. 4 ("The CFC correctly determined that the Appropriations Acts created a trust and the 1980 Act did not terminate the trust."), *id.* at 26 ("The Appropriations Acts created a trust."). That theory was the basis for the CFC's grant of partial summary judgment, see 62 Fed. Cl. at 541, and it was the question certified for interlocutory appeal, see Pet. App. 96 ("Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts"). Because petitioners' argument based on the 1863 Act was neither pressed nor passed upon below, it does not warrant this Court's review. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997).

In any event, the argument lacks merit. In the 1863 Act, Congress gave the Secretary discretionary authority to "set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual [of the Mdewakanton band] who exerted himself in rescuing the whites" from the 1862 revolt. 1863 Act § 9, 12 Stat. 654. The Secretary never exercised that authority. Pet. App. 8. There is no basis for concluding that the Secretary's unexercised authority to set aside unappropriated public lands created a trust, the corpus of which was then supplemented by the Appropriations Acts 25 years later.

4. The court of appeals also concluded that even if the Appropriations Acts did create a trust, the 1980 Act terminated that trust. Pet. App. 62-75. That holding is correct, and it provides an independent basis for the decision below.

Petitioners argue (Pet. 44-45) that Congress must use plain and unambiguous language when it terminates a trust, and the court of appeals erred in failing to apply that standard to its interpretation of the 1980 Act. That argument is incorrect for two reasons. First, as the court of appeals explained, any trust created by the Appropriations Acts was, "at most, created only by operation of law." Pet. App. 70 & n. 13. Thus, "Congress's failure to include express language of trust termination cannot be regarded as indicative of an intention not to alter the previously legal relationship among the parties." *Ibid.*[4]

Second, even if there were a clear-statement requirement in the context of this case, it would be satisfied by the patent inconsistency between the provisions of the 1980 Act and the continuation of any preexisting trust. The 1980 Act provides for the United States to hold the 1886 lands in trust for the respective communities—specifically, the "Shakopee Mdewakanton Sioux Community of Minnesota," the "Lower Sioux Indian Community

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[4] Notably, the text of the 1980 Act also supports the conclusion that Congress did not view the Appropriations Acts as creating a trust. The 1980 Act refers to the 1886 lands as lands that were then being held "for the use or benefit of"—not "in trust for"—certain Mdewakanton Sioux Indians. § 1, 94 Stat. 3262. The Act then declares that such lands are to be held in "trust" for the three communities. *Ibid.* Congress's use of the word "trust" to describe the new arrangement but not the old one reinforces the conclusion that Congress believed the 1886 lands were not held in trust prior to the 1980 Act.

of Minnesota," and the "Prairie Island Community of Minnesota." 1980 Act § 1, 94 Stat. 3262. The United States cannot simultaneously hold those same lands in trust for the loyal Mdewakanton and their lineal descendants. Under petitioner's construction of the 1980 Act, the statute creates an anomalous "trust on a trust," whereby the 1886 lands are now held by the United States in trust for the communities, who in turn are beneficiaries of that trust as well as trustees for the loyal Mdewakanton and their lineal descendants. Pet. App. 67. Petitioners have identified no other statute under which Congress created such an unusual arrangement. Instead, as the court of appeals observed, the natural conclusion is that Congress intended the 1980 Act to terminate any trust that might have been created by the Appropriations Acts rather than to create (apparently for the first time) a "trust on a trust." *Ibid.*

As the court of appeals explained, that conclusion is reinforced by the 1980 Act's purposes and legislative history. Pet. App. 65-66. In enacting the 1980 Act, Congress was concerned that the 1886 lands and lands subsequently acquired in trust for the communities had created a "checkerboard pattern of land use[] that severely diminishe[d] the effectiveness of overall land management programs and community development," *Senate Report* 2, and it sought to "eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities," *House Report* 2. Petitioner's interpretation, by creating an unprecedented "trust on a trust,"

would only compound the problem that Congress sought to solve.[5]

5. Finally, petitioners contend (09-580 Pet. 32-42) that the United States should be judicially estopped from arguing in this case that the Appropriations Acts did not create a trust or that the 1980 Act terminated any trust. This Court has never held that judicial estoppel is available against the United States, cf. *OPM* v. *Richmond*, 496 U.S. 414, 419-424 (1990), and this case is not an appropriate vehicle for resolving that question because petitioners have failed to show that the elements of judicial estoppel would be satisfied in any event. In order for judicial estoppel to apply, petitioners must demonstrate, first, that the government's current position is "clearly inconsistent" with its earlier position; second, that the government persuaded a court to accept that earlier position such that judicial acceptance of the government position here would create the perception that a court was misled; and third, that the government's inconsistent positions would give it an unfair advantage or impose an unfair detriment on petitioners. *New Hampshire* v. *Maine*, 532 U.S. 742, 750-751 (2001) (citations omitted). Here, petitioner's argument fails at the first step. As the court of appeals observed in rejecting petitioners' claim of judicial estoppel, there is nothing "said by the government attorneys in the refer-

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[5] Petitioners also suggest (Pet. 43) that this aspect of the decision below is inconsistent with *Carcieri*, which, they say, required the court of appeals to determine "who is the ultimate beneficiary of the 'lands' after the 1980 Act." But as explained above, *Carcieri* concerned the interpretation of the IRA, whereas the disposition of the lands at issue here is governed by the 1980 Act. And Congress unambiguously declared in the 1980 Act that the United States holds the 1886 lands in trust for three Indian communities.

enced cases that would support the [petitioners'] claims in this one." Pet. App. 61.

Petitioners base their judicial-estoppel argument (09-580 Pet. 33-36) on a position they allege the United States took in *Cermak* v. *United States*, 478 F.3d 953 (8th Cir. 2007), and *Cermak* v. *Babbitt*, 234 F.3d 1356 (Fed. Cir. 2000), cert. denied, 532 U.S. 1021 (2001). They assert (09-580 Pet. 33-34) that the United States argued in that litigation that "the 1863 Act and/or the Appropriations Acts created a trust." That is incorrect. To the extent that the United States discussed the lands at issue as having been held in trust for the use of certain individuals, see, *e.g.*, 09-580 Pet. 34-35, it was in the context of the relationship between the United States and a *particular individual* who held land under a specific Indian Land Certificate. The United States did not take the position that the Appropriations Acts created a trust of which the loyal Mdewakanton and their lineal descendants are beneficiaries. Indeed, fundamental to the United States' position in *Cermak* was that no one else, including especially Cermak's heirs, held any rights in the assignment. See, *e.g.*, *Cermak*, 478 F.3d at 957. Thus, the government's position in the two cases is the same.

Petitioners also maintain (09-580 Pet. 35-37) that the United States took the position in *Cermak* that the 1980 Act did not terminate any trust created by the Appropriations Acts. That is similarly incorrect. As is apparent from the quotations in the petition, what the United States said was that, with respect to land held under an Indian Land Certificate at the time of the 1980 Act, Section 3 of the 1980 Act preserved the existing certificate holder's right. The United States' position throughout this case—that the 1980 Act terminated whatever trust

(if any) was created by the Appropriations Acts—is consistent with its position that the 1980 Act did not terminate the interest of an Indian Land Certificate holder in his or her certificate. See Pet. App. 61-62; see also *id.* at 71.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

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UNITED STATES,

Respondent.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

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UNITED STATES,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONSE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUES PRESENTED

These Respondents support the Petitions of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579 (the "Wolfchild Petition"), and *Harley D. Zephier, Senior, et al. v. United States*, Docket No. 09-580 (the "Zephier Petition") for Writs of Certiorari. Accordingly, the following statement of "Issues Presented" derives from the "Questions Presented" raised in the Wolfchild and Zephier Petitions.

1. Whether the Federal Circuit's declaration of a "statutory use restriction," rather than a trust having been created "in connection with and as a consequence of" the 1888, 1889 and 1890 Appropriation Acts, establishes dangerous precedent with far reaching inter-circuit implications by: (a) rejecting as irrelevant the analytical guidelines and substantive Indian trust law set forth in *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009); (b) ignoring the historical record of the United States' official statements acknowledging a trust; (c) ignoring Agency fiduciary treatment of the 1886 lands as the trust corpus; (d) allowing the United States to assert the opposite of its prior position in court that the trust at issue exists – which advocacy produced binding federal court holdings; and (e) departing from established principles of statutory interpretation and Indian trust law as established by *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and its progeny.

ISSUES PRESENTED – Continued

2. Whether the Federal Circuit's conclusion that the 1980 Act terminated any existing trust creates erroneous precedent for Indian trust law, by dropping the requirement that a trust terminating statute be "clear and unambiguous" and encouraging the United States to take litigation positions which contradict its own prior statutory interpretations and administrative practices, particularly where: (a) the 1980 Act recites that the subject lands were being "held for the use and benefit of the heirs of Loyal Mdewakantons"; (b) never states that those benefits are intended to be nullified; (c) provides no notice of termination; and (d) Congress' own statements in the 1980 Act and related House and Senate Reports pronouncing that the 1980 Act was intended to "enhance" the beneficiaries' rights, effect "no change in existing law," and only produce "a technical change in the status" of the 1886 trust corpus lands.

3. Whether the principle of law established in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*") that "a general trust relationship between the United States and the Indian people exists" has been now overruled by the Federal Circuit opinion and replaced by a new standard strictly construing Native American statutes in favor of the government and against Indian beneficiaries.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Plaintiff-Respondents represented (in excess of 400 individuals).

CORPORATE DISCLOSURE STATEMENT

These Plaintiff-Respondents are not and do not represent a nongovernmental corporation.

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OPINION BELOW

This Responsive Brief is submitted by 424 plaintiff heirs of the Loyal Mdewakantons ("Plaintiff-Respondents" or "these Respondents") in support of the Petition for Writ of Certiorari of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579, and the Petition for Writ of Certiorari of *Harley D. Zephier, Sr., et al. v. United States*, Docket No. 09-580.

These Plaintiff-Respondents accept and support the statements of the "Opinion Below" as referenced in those Petitions.

STATEMENT OF JURISDICTION

These Respondents accept and support the "Statements of Jurisdiction" as set forth in the above-identified Petitions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the February 16, 1863 Act, 12 Stat. 654, Preamble in §§ 1 through 9; March 3, 1863 Act, 12 Stat. 819, Preamble in §§ 1 through 6; 1888, 1889 and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of March 2, 1889, 25 Stat. 980 at 992; Act of August 19, 1890, 26 Stat. 336 at 349; relevant provisions of the original Indian Reorganization Act of 1934, as amended, 25 U.S.C.

§§ 462, 463, 465 and 479, Indian Reorganization Act of 1934 (as reprinted in Wolfchild Petition Appendix at 159-160); and the Act of December 1980, Pub. L. 9-557, 94 Stat. 3262.

STATEMENT OF THE CASE

INTRODUCTION

This case involves judicial revocation of a trust created by Congress a century and a half ago to protect and reward certain Native Americans for extraordinary acts of loyalty, compassion and courage in the Dakota Uprising of 1862. During that conflict, a group of Mdewakanton Sioux sacrificed their filial and tribal connections, relinquished their property, and risked their lives and families, to save the lives and property of neighboring settlers and their families. It was an honorable act of great sacrifice which severed these Native Americans from their prior tribal relations forever.

After the 1862 Dakota Uprising was defeated, Congress meted out punishment to the Dakota tribal members: taking away their reservation lands, their annuities, and banishing and executing many of their numbers – using language of outrage and retaliation. See Act of February 16, 1863.[1] Yet even in the passion of that legislative excoriation, Congress was moved to

[1] 12 Stat. 652, App. 1-6.

recognize and reward the extraordinary sacrifice of those Indians – the "Loyal Mdewakanton" – who risked so much in their refusal to participate in the "massacre." Acknowledging that sacrifice, Congress reserved to those Loyal Mdewakanton the benefits which they had previously enjoyed by treaty but which were now terminated in response to the Dakota Conflict. Those former treaty rights now reserved to the Loyal Mdewakanton consisted of land and support granted, in Congress' words, as an "*inheritance to said Indians and their heirs forever.*"[2]

This was a good and proper thing to do. Thereafter, for 150 years, consistent with Congressional intent, the Department of the Interior held, referenced and administered these lands and support "in trust" for the benefit of the Loyal Mdewakanton – a trust which the Loyal Mdewakanton and their heirs understood and relied upon.

Now, with a decision which altered fundamental trust principles, ignored a century of Interior Department treatment of the trust corpus, misconstrued clear statutory language, and declared "irrelevant" precepts of this Court to guide analysis of such claims, the U.S. Court of Appeals for the Federal Circuit has declared that the Loyal Mdewakanton reliance upon this trust benefit was illusory. The result is that over twenty thousand surviving heirs of the Loyal

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[2] Id. at § 9, App. 6.

Mdewakanton suddenly and forever lost the legacy of their ancestors' great sacrifice.

This Court should accept the Petitioners' Writs of Certiorari and correct this far reaching injustice. This is an injustice which not only divests tens of thousands of Native Americans of their trust inheritance, but also calls into question the trust worthiness of the United States.

FACTUAL BACKGROUND

This case is rooted in undisputed history[3] – that a group of Minnesota Native Americans elected to save white settlers from attack and death at the hands of their own tribal relations. As a result of that extraordinary event, Congress chose to create a trust of land and other assets for these "Loyal Mdewakanton" and their "heirs forever."

This historic underpinning cannot be set aside, leaving the emergent statutes to be parsed and dissected in legalistic isolation. Rather, the intent and meaning of the subject statutes can only be accurately gleaned with a full appreciation for their historical context. Once analyzed from a correct historical understanding, the conclusion is inescapable that grave errors of law were committed by the U.S.

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[3] The Wolfchild and Zephier Petitions, and several District Court opinions below, cover the facts in detail. This response simply highlights critical points.

Court of Appeals for the Federal Circuit in this case, with serious negative implications for tens of thousands of surviving heirs of the Loyal Mdewakanton and other Indian trust beneficiaries.

During the Dakota Conflict of 1862 (the "Conflict" or "Dakota Conflict"), the Loyal Mdewakanton were not motivated by money, but compassion, when they risked their property, their lives and their tribal relationships to save white Minnesota settlers. Yet only when the Conflict ended did the full import of their sacrifice become clear. Many among the white population of Minnesota reviled the Loyals for their racial and tribal connection to the perpetrators of the violent uprising. At the same time, the tribes as a whole severed relations with the Loyals for their refusal to join the insurgency – and for their protection of the white settlers.

In an atmosphere of outrage and retribution following the Conflict, the United States Congress passed legislation on February 16, 1863 (the "February 1863 Act").[4] That Act's very title expressed the anger of the legislators at the mass killing of white settlers:

> *"An Act for the Relief of Persons for Damages sustained by Reason of the Depredations and Injuries by certain Bands of Sioux Indians."*[5]

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[4] 12 Stat. at 652, App. 1-6.

[5] Id., App. 1.

The preamble of the Act expanded on this theme:

> "[D]uring the past year the aforesaid bands of Indians made an unprovoked, aggressive and most savage war upon the United States and massacred a large number of men, women and children within the State of Minnesota, and destroyed and damaged a large amount of property. . . ."[6]

The February 1863 Act gave full voice to Congress' indignation by annulling *any and all* treaty rights inuring to the benefit of the rebel Dakota bands. As a result, these bands lost their perpetual and term annuities; all property rights in reserved lands; and all claims against the United States derived from their treaties:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all treaties heretofore made and entered into by the . . . bands of Sioux or Dakota Indians . . . with the United States are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or

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[6] Id., App. 1.

> any of them, to be forfeited to the United States."

(Emphasis added).[7]

Following this language of annulment and abrogation, the February 1863 Act went on, through eight sections, to establish a process for injured Minnesota settlers to obtain compensation for their losses from the terminated treaty annuities. The final Section 9 of the Act, while continuing the theme of compensation and restoration, took a decidedly different turn. Section 9 focused entirely upon honoring and providing for those loyal Indians who had "exerted [themselves] in rescuing the whites from the late massacre. . . ."[8]

The significance of this final section can only be understood in the dramatic context of the fury which led Congress to annul the Dakota treaties. Section 9 of the Act recognized the sacrifice of the Loyal Mdewakanton and effectively granted back to them

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[7] Id., App. 1-2. The volume of treaty rights annulled by this Act reflects the magnitude of Congressional anger. These included an 1837 treaty with the Mdewakanton and other Minnesota bands which created reservation lands and a perpetual annuity (7 Stat. 538); and an 1851 treaty with the Mdewakanton and Wahpekute Bands of Minnesota which created a supplemental fifty-year annuity (10 Stat. 954).

[8] Id., App. 6.

the treaty rights now otherwise abrogated for the warring bands:

> "Sec. 9. *And it be further enacted* That the Secretary of the Interior is hereby authorized to set apart of the public lands . . . eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, *but shall be an inheritance to said Indians and their heirs forever.*"[9]

(Emphasis added).

The trust created by this Act was not only intended to reward the Loyals for their courage, but also to protect those few Loyals who remained in Minnesota. The expulsion of rebel Dakota Indians from Minnesota following the Conflict ultimately caused the Minnesota Mdewakanton population to fall from between 6,000 and 10,000 people in 1862 to approximately 200 Loyal Mdewakanton in 1886. The remaining Loyals thus became subject to the desire for vengeance and the fears of many Minnesota surviving settlers.

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[9] 12 Stat. at 654, App. 1-6.

In its 2009 opinion, the Federal Circuit recognized the significance of the February 1863 Act as creating a trust for the Loyal Mdewakanton. In the words of the Federal Circuit, the February 1863 Act defined the property interest that the Indians were to receive in the lands set aside for them. The Federal Circuit acknowledged that the language of that Act "clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute."[10] The Federal Circuit mistakenly ruled, however, that this language was "superseded" by another statute passed by Congress two weeks later, on March 3, 1863 (the "March 1863 Act").[11]

The March 1863 Act was entitled "*An Act for the Removal of the Sisseton, Wahpaton, Medawakanton and Wahpakoota Bands of Sioux and Dakota Indians for the Disposition of their Lands in Minnesota and Dakota.*"[12] The March 1863 Act was not a nullification of the February 1863 Act, nor did it supersede the February Act. Rather, the March Act continued and expanded upon the February 1863 Act by

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[10] *Wolfchild, et al. v. United States*, 559 F.3d 1278, 1282 (Fed. Cir. 2009), Wolfchild Petition, App. 7.

[11] 12 Stat. 819, App. 7-10.

Notably, it does not appear the March 1863 Act was raised by the defendant United States in any of its moving papers or oral argument, nor in the lengthy and scholarly October 27, 2004 Opinion and Order of the Honorable Judge Charles Lettow which underlay the appeal to the Federal Circuit. Its first appearance in this case was in the Federal Circuit Judgment.

[12] 12 Stat. 819, App. 7-10.

extending to the Secretary of the Interior authority to use confiscated tribal lands as a potential source of the corpus of that trust. In summary, the March Act authorized and guided the President and the Secretary of the Interior: (a) to assign new lands outside Minnesota to the warring band members exiled from Minnesota after the Conflict (Section 1);[13] (b) to survey and prepare for sale the former reservation lands of the warring bands (Section 2);[14] (c) to permit entry and settlement of these reservation lands following auction (Section 3);[15] and (d) to apply the proceeds from such sale to the construction of new homes for the warring bands in their new reservation lands (Section 4).[16]

Of particular significance here, however, the March Act further provided that the Secretary was allowed to locate:

> " . . . any meritorious individual Indian of said bands, who exerted himself to save the lives of the whites in the late massacre, upon [the prior Dakota reservation lands] . . . *assigning* the same to him to the extent of eighty acres, to be *held* by such tenure as is or may be provided by law."[17]

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[13] 12 Stat. 819, App. 7.

[14] 12 Stat. 819, App. 7-8.

[15] 12 Stat. 819, App. 8.

[16] 12 Stat. 819, App. 9.

[17] 12 Stat. 819, Section 4, App. 9.

(Emphasis added). Coming only two weeks after the February 16 Act which directed creation of a trust of inalienable land to be held for the Loyal Mdewakantons and their heirs forever, the March Act permitted the Secretary of the Interior to use parcels of former reservation lands to achieve that purpose.[18]

Nowhere in the March 1863 Act was there any language stating or implying the Federal Circuit's contrary conclusion: that the March Act superseded the February 1863 Act. Nor is there any Congressional history in the record to suggest such a goal – a goal which makes no sense given the clearly expressed intent of Congress only weeks earlier to provide for the Loyal Mdewakanton and their heirs "forever."

While the record is sketchy of the Interior Department's initial efforts to provide land and support to the Loyal Mdewakanton in compliance with the 1863 Acts, it is clear that the February and March 1863 Acts' provisions for the Loyal Mdewakanton were ultimately funded in the Congressional Appropriation Acts of 1888, 1889 and 1890.[19] Thereafter, the land and other resources appropriated for the benefit of the Loyal Mdewakanton were held and

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[18] Notably, the assignment mechanism described in the February and March 1863 Acts for insuring that the Loyal Mdewakanton land remained inalienable "forever" was applied over the next century to the lands acquired in 1888 and thereafter "*held*" by the United States, "*set apart*" for individual Loyals, and "*assigned*" to them as life estates.

[19] Wolfchild Petition, App. 154-156.

administered by the Department of Interior toward that end.

The fiduciary relationship resulting from the February and March 1863 Acts and the funding Appropriation Acts of 1888, 1889 and 1890 was honored by the government for the next one hundred years. Hundreds of documents were officially recorded by Interior reciting the trust corpus lands as being "held in trust," and governmental actions consistently treated the lands and other resources as trust assets held exclusively for the benefit of the Loyal Mdewakanton heirs.

Examples of actions by the Department of the Interior and Congress consistent with recognition of a fiduciary obligation over the next century included, among other measures:

- Creating an assignment system by which legal title to the land remained in the United States' name, but land was assigned for beneficial use by the Loyal Mdewakanton and their heirs;

- Creating evidence of land assignments to the assignees which certified that the particular land recipient "and his heirs are entitled to immediate possession of said land, which is to be held *in trust* by the Secretary of the Interior, for the

exclusive use and benefit of the said Indian"[20] (Emphasis added);

- Requiring unanimous approval, in 1901, of all Loyal Mdewakanton for the proposed sale of a small section of the 1886 trust lands, "The land was purchased for . . . [the] benefit [of the Loyal Mdewakanton], and the title is in them subject to a provision by which they cannot convey it;"[21]

- Passage of the 1934 Indian Reorganization Act ("IRA") which provided for the continuation of all trust rights and benefits then existing and Interior's continuing practice of holding and administering the corpus lands consistent with the IRA; and

- Acknowledging, in the sale of a tract of the 1886 lands in 1944, that the transfer and sale of the tract operated as a "full, complete and perfect extinguishment" of all the "right, title and interest" that the Mdewakanton and Wahpakoota bands have had in the tract.[22]

Finally, in 1980, certain Indian communities which had been organized pursuant to the 1934

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[20] Indian Land Certificate of Harry Bluestone (June 1, 1905), Wolfchild Petition, App. 139-142.

[21] 34 Cong. Rec. 2523 (1901).

[22] Act of 1944, § 2, 58 Stat. at 274.

Indian Reorganization Act,[23] sought greater control over the lands acquired for the Loyal Mdewakanton. Those trust corpus lands were contiguous with additional non-trust lands controlled by those communities – creating a "checkerboard" pattern of ownership interests which impeded the development. A bill was proposed to eliminate the long standing recognition of distinctions between these Indian community lands acquired and held by the United States exclusively for over a century for those Native Americans "who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefit of the 1886 lands."[24] Congress ultimately passed the bill, and it was signed into law by President Carter on December 19, 1980.[25]

In the Senate Report of the 1980 Act, Congress emphasized the United States' continuing fiduciary obligations to honor the Loyal Mdewakanton beneficiaries' rights when it explained that the purpose of the 1980 Act was to "enhance the beneficial use of the land." The Report further clarified that the 1980 Act would make "no change to existing law" and would affect only a "technical change in status" of the land. Nowhere did Congress state or even suggest: (a) that those century-old rights were to be nullified; (b) that

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[23] See Act of 1934, 25 U.S.C. §§ 462, 463, 465 and 479, Indian Reorganization Act, *et seq*.

[24] H.R. Rep. No. 96-1409 (1980), App. 40-41.

[25] 126 Cong. Rec. 32,898 (1980), App. 40-41.

the trust relationship was to be abolished; or (c) that beneficiaries were to be forever barred from enjoyment of the benefits flowing from the 1886 lands.[26]

Only subsequent to the 1980 Act, despite the absence of any authorization to abolish the acknowledged rights of these beneficiaries, did the United States abandon the heirs of the Loyal Sioux. Rather than ensuring that the new Indian communities and the Interior Department coordinate and develop the community lands with those held for the Loyal Mdewakanton so as to benefit *both* the distinct communities and the Loyal Mdewakanton beneficiaries, the government suddenly allowed *all* benefits to flow only to the communities' own members to the exclusion of the thousands of Loyal Mdewakanton.

Since that time, the Loyals' trust corpus lands have been employed for the enrichment of the controlling communities and their narrowly enrolled members. Ninety-five percent of the Loyal beneficiaries have been excluded from membership in those communities. Yet the government has set aside nothing for the use and benefit of these Respondents or the Wolfchild and Zephier Petitioners.

This breach of the fiduciary duty of the government, established in the legislation of 1863 through 1896, continues to the present day.

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[26] App. 40-41.

REASONS FOR GRANTING PETITIONS

As expressed in the Petitioners' arguments, and supported by the following Respondents' arguments, in order to reach its result the Federal Circuit Court of Appeals incorrectly:

(1) Adopted a conclusion and position contrary to government practice and pronouncements for over a hundred years, and never taken in prior litigation of these issues by the United States – that no legal trust ever existed;

(2) Focused on only the last step in the trust creation process – the Appropriation Acts funding the trust – and ignored the role of the 1863 Act in creation of the trust;

(3) Ignored the evolution of Indian treaty and trust law over a 120 year period by insisting upon an explicit declaration of a "trust" in the Appropriation Acts funding the trust corpus;

(4) Ignored clear Congressional intent, expressed in the 1863 Act, to establish a trust in perpetuity for the heirs of the Loyal Mdewakanton;

(5) Misconstrued the 1980 Act contrary to its language and history; and

(6) Disregarded the *Carcieri* decision, at 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009).

These Respondents therefore support Petitioners' prayer for review and reversal of the Federal Circuit's opinion, as argued more fully below.

I. The Federal Court of Appeals Opinion Shattered the Loyal Mdewakantons' "Trust" By Adopting a Conclusion Contrary to Government Practice and Pronouncements for Over a Hundred Years, and Never Taken By Any Party or Court Before This Litigation – That No Legal or Equitable Trust Ever Existed.

The sacred significance of a trust is highlighted by the word itself. Here, in 1863 through 1890, Congress set forth the historical foundation, legislative purpose and the means for establishing a trust relationship between the United States government and the Loyal Mdewakanton. Congress entrusted the executive branch with authority and responsibilities: to purchase and hold lands, and manage the resulting corpus for the use and benefit of the Loyal Mdewakanton and their heirs forever. In turn, the beneficiaries placed their "trust" in the good faith of the government to act consistent with its promises. For over one hundred years, that trust was honored and the beneficiaries' reliance on the government was affirmed.

Even in the Act of 1980, Congress once again recognized the long-standing existence and purpose of the trust corpus for the "use and benefit" of the Loyal Sioux. Both the House and Senate Report(s) to the

1980 Act stated unequivocally that the intent of that Act was to "enhance" the benefits owed to the Loyal Mdewakanton.[27] Thus from 1863 through 1980 and beyond, the trust between the federal government and the Loyal Sioux was maintained.

Only subsequent to these acknowledgments did the government begin to deviate from its fiduciary mandate by allowing trust corpus assets to be used to benefit exclusively Community members. Yet membership in the communities consists of less than five percent of the class of intended beneficiaries (heirs of the Loyal Mdewakanton) and includes a large percentage of non-beneficiaries (heirs of Sioux who were not among the Loyal Mdewakanton). Thereby the trust, in all of its meanings, was broken.

The District Court, with the benefit of years of briefings and hearings, understood this history, the statutory creation of the trust, and its breach. Unfortunately, the Federal Circuit panel did not. By adopting the United States' contention that no trust *ever* existed – a contention never previously claimed in any other litigation relating to these issues – the Federal Circuit rendered irreparable what was heretofore only broken.

What relationship has existed for the past century between the United States and the Loyal Mdewakanton, if not a trust? What does the current

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[27] App. 11-39.

opinion say to the thousands of heirs about the sanctity of their ancestral rights or their relationship with the federal government? What does this decision suggest to Native Americans across the century about the fragility of placing their trust in the government's promises? This case cries out for review.

II. The Federal Circuit Focused on Only the Last Step in the Trust Creation Process – the Appropriation Acts Funding the Trust – and Ignored the Role of the 1863 Act in Authorizing the Creation of the Trust.

In the Federal Circuit's analysis of the issues in this case, it ignored or misinterpreted the February 1863 Act and related legislation, reviewing the subsequent Appropriation Acts in isolation from their source.[28] This analysis was both legally and factually improper.

The Honorable Judge Charles Lettow of the United States Court of Federal Claims had the benefit of years of experience and lengthy hearings, briefs, and argument when he certified the questions for determination by the Federal Circuit. With the

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[28] In fact, the Federal Circuit restated the carefully worded certified question to support this method of evaluating the issues, recasting the lower Court's certification of the issue from whether a trust was created "in connection with and as a consequence of" the Appropriation Acts, to whether the Appropriation Acts themselves, in isolation, created a trust.

benefit of this knowledge, Judge Lettow did not ask whether the Appropriations Acts of 1888, 1889, and 1890, in isolation, created a trust. The Court of Claims recognized the importance of the dramatic historical context and the *origin* of the trust in the authorizing language of the February 1863 Act. The Court of Claims further understood that the *trust corpus* at issue was ultimately acquired by the United States pursuant to the Appropriation Acts of the 1880's. These Appropriations Acts were necessary to establish the final trust corpus – but they drew authority from the February 1863 Act announcing the creation of the trust.

Accordingly, the certified question from the Court of Claims asked: "[W]hether a trust was created *in connection with* and *as a consequence* of the . . . Appropriation Acts. . . ." (Emphasis added). Thus, the issue was whether a trust was created not in isolation, but in conjunction with, the 1888-1890 legislation.

The Federal Circuit's analysis looked exclusively to the Appropriation Acts for what it deemed was essential language necessary for creation of the trust – i.e. the Appropriation Acts were required to stand alone in the creation of a trust.[29] With this

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[29] As argued by the Wolfchild Petitioners, it was further error for the Federal Circuit to assert that *any* particular language was required in the statute to establish a trust, so long as the indices of a trust existed.

inexplicably myopic approach to the certified questions, the Federal Circuit reached the conclusion that the Appropriation Acts, standing alone, did not create a trust.

The Federal Circuit did recognize that the February 1863 Act could not be entirely ignored if it was to conclude that no trust was created for the Loyal Mdewakanton. The Federal Circuit acknowledged that:

> "[The February 1863 Act] language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute."[30]

The Federal Circuit went on to conclude, however, that the subsequent March 1863 Act "superseded" the February 1863 Act, and therefore that the trust creating language of the February 1863 Act could be ignored in its analysis.

The Federal Circuit's conclusion that the March 1863 Act superseded the prior February Act was reached without reference to any language in the March Act which would support such a conclusion, nor with any citation to legal authority for this conclusion. In fact, in order to reach its result, the Federal Circuit ignored longstanding precedent of this Court that repeals of legislation by implication are disfavored and that, in the absence of an affirmative showing of a legislative intention to

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[30] Wolfchild Petition, App. 29.

repeal, the only permissible justification for repeal by implication is irreconcilability.[31]

Consistent with this rule, the intention of the legislature to supersede a prior statute must be clear and manifest: it is not sufficient to establish such a repeal that a subsequent law covers some or all of the cases provided for by the prior act.[32] If, by any reasonable construction, two statutes on the same subject could stand together, they are required to so stand.[33]

In the face of this black letter law, there was no basis for the Federal Circuit to conclude that the March 1863 Act superseded the February Act. In fact, it was not even a close issue. As discussed above, there is no language whatsoever in the March 1863 Act even suggesting a statement of intent to supersede the legislature's two week old direction to the Secretary of the Interior to establish lands and support for the Loyal Mdewakanton and their "heirs forever." Neither was the March 1863 Act itself in any way irreconcilable with the February 1863 Act.

Accordingly, the Federal Circuit could only reach its erroneous decision by recasting the certified

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[31] See *State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439; 5 S.Ct. 716; 89 L.Ed. 1051 (1945).

[32] See *U.S. v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

[33] See *J.E.M. Ag Supply Inc.v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 122 S.Ct. 593, 151 L.Ed. 508 (2001); and *State of South Carolina v. Stoll*, 84 U.S. 425 (1873).

question presented to it; ignoring long standing precedent of this Court as to when subsequent legislation can be deemed to supersede prior Congressional Acts; and thereby conclude with a decision which negated the expressed will of Congress to create inheritable trust rights in the February 1863 Act.

This Court should correct this manifest error.

III. The Federal Circuit Opinion Ignored Long-Standing Indian Treaty and Trust Law By Declaring the Necessity of an Explicit Declaration of a Trust in the Appropriation Acts Funding the Trust Corpus.

As argued above, the standing opinion collapses because its critical assumption, that the March 1863 Act superseded the February 1863 Act, is incorrect as a matter of law. The Federal Circuit opinion rests on and requires the false conclusion that the 1863 Acts (authorizing the establishment of a land set aside, and assignments of a trust corpus of land) had no legal or equitable effect. Despite the absence of any legal or evidentiary support for such a conclusion, the Federal Circuit asserted: "Two weeks after the enactment of that provision [Feb. 16, 1863 Act, Sect.

9], . . . Congress superseded it with another statute dealing with the same authorization."[34]

Native Americans have long held a strained relationship of suspicion toward the federal government. That history need not be repeated in this brief. However, that relationship will not be improved by allowing the Federal Circuit's decision to stand. The lessons are stark. Despite sacrificing for the country and receiving protection and provision for that courage, Indians still cannot count on the government to keep its promises.

The ancestors of the Petitioners here sacrificed everything for their neighbors. To replace treaties annulled for no fault of theirs, these Indians were promised the benefit of lands to be held and managed by the government to honor their loyalty, courage and suffering. The government repeatedly reassured them by recognizing and maintaining the resulting trust for a century. Congress eventually promised the beneficiaries that it would "enhance" their benefits by legislating "technical changes in the status" of the trust lands that would "effect no change in existing law." The government even maintained in official court documents and established by federal court rulings that a trust exists.[35]

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[34] Wolfchild Petition, App. 7.

[35] See *Brewer v. Acting Deputy Assistant Secretary*, 10 IBIA 110, 119 Note 8 (1982); *Cermak v. Babbitt*, 234 F.3d 1356, 1358-59 (Fed. Cir. 2000); and *Cermak v. Norton*, 322 F.Supp.2d 1009,

(Continued on following page)

Nevertheless as it stands, the courts may eradicate these Native Americans' ancestral rights and benefits, using a 120-year retrospective insistence on an explicit declaration of a "trust" in appropriation acts funding the trust corpus. This is not consistent with the hard-fought evolution of Indian treaty and trust law.

IV. The Federal Circuit Ignored the Clearly Expressed Intent of Congress to Establish Perpetual Rights in the Loyal Mdewakanton and Their Heirs.

The congressional intent to honor the courage and sacrifice of the Loyals during a most trying period in American history consistently appears in the unique treatments specifically given to Loyals by the Department of the Interior through the next hundred years. This should be given great weight. Examples abound in the record.[36]

Nowhere does the 1980 Act notify, suggest, authorize or mention a termination of these rights and benefits of the vast majority of beneficiaries.

1015 (D. Minn. 2004), aff'd, *Cermak v. United States*, 478 F.3d 953 (8th Cir. 2007).

[36] See Interior Department practices with respect to holding of monies (JA0825, 1737, 2543 and 3573-78); holding of monies from gravel pit and quarry receipts (JA2539-45); and Land assignment certificates (JA0940-44, 1144, 1146, 1150-51, 1153 and 2009-23).

Instead, the 1980 Act recognizes and furthers the mandate of the 1863 Acts and the enabling acts of 1880-1890. The 1980 Act addresses barriers to the beneficiaries' ability to enjoy the most productive use of the 1886 lands due to the barriers created by a jurisdictional checkerboard ownership pattern. By allowing community development of a seamless pattern of land ownership, the referenced benefits to the Loyals were to be "*enhanced*" – not obliterated. One can only imagine the outcry in and to Congress had it understood – as the government now argues – that it was cancelling one hundred years of fiduciary obligations and cutting off rights and benefits of thousands of descendants of the Loyal Mdewakanton. Had the Federal Circuit's radical interpretation been predicted, not only would the Act have lacked any language supporting such a conclusion: the Act would have been replete with language insuring no such affect.

In addition to the bill itself, the 1980 Act's legislative history directly contradicts the claim that it terminated the Loyals' trust:

- The Senate Report concludes that the passage of the 1980 Act would effect "no change in existing law."[37] Yet, the Federal Circuit's interpretation would radically change over one hundred years of existing law.

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[37] App. 39.

- The House and Senate Reports state that the bill is only a "technical change in the status" of the 1886 lands – not a radical shift in benefits, rights and ownership to the exclusion of ninety-five percent of the beneficiaries.[38]

- The House and Senate Reports reassure the legislature that the bill "protects the rights of all persons having a present interest in the lands."[39] The Loyals were the only persons with a present interest in the lands.

- The House and Senate Reports further state, "The purpose [of the 1980 Act] is to change and clarify the legal status of the lands . . . in order to *enhance the beneficial use* of the lands to be . . . " (Emphasis added).[40] "Enhance" whose beneficial use? Only the Loyals held any rights to beneficial use and only their rights could be "enhanced." The recently formed communities had no such beneficial use to enhance. But consistent with Petitioner's positions, the communities' ability to manage seamless reservation property *would* "enhance the beneficial use" of the Loyals – as well as

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[38] App. 11-39.

[39] App. 11-39.

[40] App. 40-41.

provide some advantage to non-Loyals, as the 1980 Act recognizes.[41]

- The House and Senate Reports further state that there will be "no additional cost to the government." Why? Because the bill enhanced the rights of Loyals and also contributed to the ability of communities to better manage their entire reservation property to the benefit of the communities and beneficiaries alike. Thus, no one was damaged or harmed by the 1980 Act. Accordingly, there was no controversy and no anticipation of litigation for the loss of benefits to thousands of Loyals as would have been obvious had that been the bill's intent.[42]

- The House and Senate Reports make no mention, despite lengthy descriptions of the 1980 Act and its purposes, of annulling rights and benefits provided to Loyals for 100 years. Nor do the Reports suggest that there is any annulment of the Congressional intent emphatically expressed in the 1863 Act, the 1888-1890 Appropriation Acts and the many acts following that all recognized the rights of the Loyals.[43]

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[41] App. 40-41.

[42] App. 40-41.

[43] App. 11-39.

In summary, the seamless history of Congressional action and pronouncements toward the Loyal Mdewakanton from 1863 through 1980 all demonstrate consistent and unbroken Congressional intent to honor the Loyal Mdewakanton and their heirs forever.

V. The Federal Circuit's Opinion Rewrites the 1980 Act Contrary to its Language and History.

What the Federal Circuit opines as Congressional intent in 1980 was never presented in any of the House or Senate Reports or on the House floor, nor does it appear in the language of the statute itself. Moreover, this interpretation does not square with any of the history of the trust relationship between the government and the Loyals flowing seamlessly from 1863 on.

The Court's ignoring of that history is telling. As the 1980 Act makes clear, the history of the acquisition of the 1886 lands flows directly from the sacrifice and loss suffered by the Loyals in the 1862 uprising as recognized in the 1863 Act. Congress' concerns in 1980 that the "held" land was not receiving its highest and best use for the benefit of the Loyal heirs, due to practical problems of efficient investment and effective jurisdiction, is also clearly stated.

The Congressional concern expressed in the 1980 Act is for the Loyals – no one else. Yet the decision of

the Federal Circuit would reach a contrary end: completely strip the very ancestral rights of those beneficiaries which the Congress expressly recognized and sought to "enhance." It is entirely unreasonable to conclude that the Congress intended such a result without any notice of trust termination and without mention of any intent to abolish or reverse beneficial rights flowing from 1863 through the 1880-1890 Acts. Nor is there any expressed intention – unlikely in any event – that Congress sought to transfer these benefits to non-beneficiary members of newly formed communities.

The Federal Circuit reading inverted Congressional intent, rewrote American history, and adopted the United States' after-the-fact attempt to rationalize its failure to perform its fiduciary role as trustee of the Loyals' beneficial rights in the 1886 lands.

VI. The Federal Circuit Disregarded *Carcieri*.

Two weeks before the Federal Circuit panel issued its opinion here, this Court announced its decision in *Carcieri*, *supra*. That decision was brought to the attention of the panel. However, rather than applying its precepts, the Circuit dismissed it in a

footnote as not "in any way relevant" to the issues herein.[44]

This response was stunning. *Carcieri* dealt with the issues directly relevant to the present case. In *Carcieri*, the Court considered the proper interpretation of statutory authorizations related to Indian trusts (the 1934 Indian Reorganization Act); utilized extensive evidence of the Department of the Interior's own understanding and application of the statute; reversed the First Circuit's and District Court's holdings in favor of the federal government's granting extensive trust rights to certain newly formed Indian communities; and rejected the government's arguments that it was authorized by statute to do so.

Thus, this Court in *Carcieri* provided direction in Indian trust cases – direction dismissed by the panel as having any bearing on this case. In particular, the Court's historically detailed analysis of the precise meaning and intent of the IRA statute did not stop at only an internal examination of the rhetoric of the bill *in isolation*, but put substantial weight on the government's documented interpretation of that language and its management of the issue with the same party. Yet, the Federal Circuit dismissed that analysis in one footnote and ignored the hundreds of exhibits of documented evidence that established objectively the countless times that the 1886 lands

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[44] Wolfchild Petition, App. 53.

were referenced as held in trust for the Loyal Mdewakanton's benefit. In short, the Federal Circuit panel did what the courts in *Carcieri* did – which subjected the latter courts to reversal.

The *Carcieri* decision was pointedly brought to the panel's attention, yet with no analysis, the panel waived aside the Supreme Court's guidelines for looking at how, when, and whether the government places assets in trust for the benefit of Native American groups – especially involving communities not recognized at the time of the 1934 IRA.

The Supreme Court should reestablish and enforce the guidelines it provided in *Carcieri*.

In addition, the Federal Circuit's opinion ignored not only the analytical guidelines, but the *holding* of *Carcieri*. As such, it created a quagmire of issues that could and should have been avoided.

As it stands, the instant opinion concludes that, despite 100 years of trust management and repeated reassurance of the trust's existence and benefit, no trust ever existed. Yet, the Court then views the 1980 Act as authorizing the Department of the Interior to abolish all beneficial rights to land purchased and held for a specific group of Indians recognized since 1863 and to transfer all rights and benefits exclusively to small Indian communities – communities which did not exist in 1934 at the time of the IRA's passage. Consistent with *Carcieri*, the government

had *no* authority under the IRA to establish this new trust. If, as Petitioners argue and the evidence proves, the land was *already* held in trust for the benefit of a distinct group of Indians (the Loyals), recognized since 1863, there is *no* contradiction with *Carcieri*'s holding a trust already existed and the denoted beneficiaries' rights were to be "enhanced" in 1980 to allow the land's highest and best use for the benefit of the Loyal heirs. That effort to enhance the benefits to the designated beneficiaries was exactly what a trustee exercising its fiduciary responsibilities should have done in any case. That the government later failed to follow that 1980 Congressional mandate and breached its fiduciary duty to the Loyals does not change the historical or legal fact that a trust relationship had existed with the Loyals for over one hundred years and was not extinguished by the 1980 Act's enhancement of beneficiary rights.

VII. The Federal Circuit Opinion Appears to Create a New Strict Construction Standard and Rejects the Principle of a "General Trust Relationship Between the United States and the Indian People."

There is no dispute that the 1886 lands have been acquired, held and managed for the use and benefits of Loyal Mdewakanton for over a century. Particularly in light of the unique history here, this relationship is consistent with the principle that

there exists a "general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*").

Yet, disregarding the general trust principle of *Mitchell II*, the Federal Circuit adopted the opposite approach – one of strict *statutory* construction against the existence of a trust. Where does this leave the principle enumerated in the *Mitchell* decisions? Has that principle been now discarded?

All Native Americans have an interest in the resolution of this issue. It deserves careful and clear consideration by this Court.

CONCLUSION

The Wolfchild and Zephier Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

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THIRTY-SEVENTH CONGRESS. SESS. III CH. 84, 86, 87. 1863.

* * *

CHAP. XXXVII. – *An Act for the Relief of Persons for Damages sustained by Reason of Depredations and Injuries by certain Bands of Sioux Indians.*

Whereas the United States heretofore became bound by treaty stipulations to the Sisseton, Wahpaton, Medawakanton, and Wa[h]pakoota bands of the Dakota or Sioux Indians to pay large sums of money and annuities, the greater portion of which remains unpaid according to the terms of said treaty stipulations; and whereas during the past year the aforesaid bands of Indians made an unprovoked, aggressive, and most savage war upon the United States, and massacred a large number of men, women, and children within the State of Minnesota, and destroyed and damaged a large amount of property, and thereby have forfeited all just claim to the said moneys and annuities to the United States; and whereas it is just and equitable that the persons whose property has been destroyed or damaged by the said Indians, or destroyed or damaged by the troops of the United States in said war, should be indemnified in whole or in part out of the indebtedness and annuities so forfeited as aforesaid: Therefore –

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all treaties heretofore made and entered into by the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, or

any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States.

SEC. 2. *And be it further enacted*, That two thirds of the balance remaining unexpended of annuities due and payable to said Indians for the present fiscal year, not exceeding one hundred thousand dollars, being two thirds of the annuities becoming due and payable to said Indians during the next fiscal year, is hereby appropriated, and shall be paid from the Treasury of the United States, out of any moneys not otherwise appropriated, to the commissioners hereinafter provided for, to be apportioned by them among the heads of families, or, in case of their decease, among the surviving members of families of the State of Minnesota who suffered damage by the depredations of the Sisseton, Wahpaton, Medawakanton, and Wa[h]pakoota bands of Sioux or Dakota Indians, or by the troops of the United States in the late Indian war in the State of Minnesota, not exceeding the sum of two hundred dollars to any one family, nor the actual damages aforesaid, and no moneys shall be paid under this section except upon those claims which shall be presented to said commissioners on or before the first day of June next, for the payment of which the said commissioners shall

take and return to the Secretary of the Interior and to the Secretary of the Treasury duplicate vouchers therefor, certified by them.

SEC. 3. *And be it further enacted*, That, for the purpose of making the proper distribution of the moneys hereby appropriated for the present relief of such families, and for the purpose of ascertaining the whole amount of said damages and the persons who have suffered the same, it shall be lawful for the President, by and with the advice and consent of the Senate, to appoint three commissioners, not more than one of whom shall be a resident of Minnesota, who shall take an oath in the manner prescribed by the laws of the United States to faithfully discharge their duties; they shall entertain and hear the complaints (in writing, duly verified on oath) of all and every person aggrieved by the depredations of said Indians, and by the troops of the United States in said war; they shall have power to compel he attendance of witnesses, and to administer the proper oaths to them to testify the truth; they shall have power to compel the claimants to be examined and cross-examined on oath, to be administered by them, as to their said claim; they shall hold their sessions at such times and places as will give the persons complaining the fairest opportunity of verifying their claim with the least expense; they shall take care that no unjust or fictitious claim shall be established; and if they have any reason to suppose that any such claim is presented, they shall have power, and it shall be their duty, to procure any countervailing proof, to

their knowledge, that the same may be finally rejected. The testimony of the witnesses and the examination of the complainant shall be reduced to writing, signed and certified by them, respectively, and shall, with the petition and all the papers relating to each case, with the finding of the commission, be transmitted to the Secretary of the Interior for his approval, rejection, or modification, to be by him laid before the next Congress. A majority of the commission may select their presiding officer, and shall be competent to decide all questions arising before them.

SEC. 4. *And be it further enacted*, That said commissioner shall hold their first session at Saint Peter's, in the State of Minnesota, on or before the first day of April next, for the hearing of claimants, and that all claims must be presented to said commissioners on or before the first day of September next, or the same shall not be heard by them; and the said commissioners shall make and return their finding, and all the papers relating thereto, on or before the first day of December next.

SEC. 5. *And be it further enacted*, That said commissioners shall receive for their services and expenses the sum of two thousand five hundred dollars each. And they are authorized to depute a proper person to summon witnesses, who shall be entitled to receive his actual expenses, to be allowed by said commissioners, and the sum of three dollars per day for his services. Witnesses subpoenaed in behalf of the United States shall receive pay for

attendance, not to exceed the fees allowed by the laws of Minnesota for witnesses attending justices' courts. And, for paying the expenses of said commission, the further sum of ten thousand dollars is hereby appropriated out of the said annuities in the Treasury of the United States, or so much thereof as may be necessary to pay the same.

SEC. 6. *And be it further enacted*, That the Secretary of the Interior, immediately after the passage of this act, shall cause the same to be published in four of the newspapers of the State of Minnesota which, in his opinion, will give the most publicity to the same among the people who have suffered by said depredations, and give notice of the first meeting of said commissioners, the expenses to be paid out of the sum appropriated in the next preceding section.

SEC. 7. *And be it further enacted*, That if the complainant, or any witness testifying before said commissioners, shall be guilty of perjury, upon conviction thereof in the proper court of the United States, he shall suffer the pains and penalties prescribed by the laws of the United States for that offence.

SEC. 8. *And be it further enacted*, That the said commissioners may make rules, not inconsistent with this act, prescribing the order and mode of presenting, prosecuting, and proving said claims before them, which rules shall be published in one newspaper in the city of Saint Paul and one in Saint Peter

for at least two weeks prior to the first session of said commission, to be held at Saint Peter as directed in the fourth section of this act, and the expenses of each publication shall be paid out of the fund appropriated in the fifth section of this act.

SEC. 9. *And be it further enacted*, That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

SEC. 10. *And be it further enacted,* That said commissioners, before entering upon the discharge of their duties as such, shall give bonds in the usual form to the United States, in the sum of twenty thousand dollars each, with good and sufficient security, to be approved by the Secretary of the Treasury, faithfully to discharge their duties as such, and to account for any money which may come into their hands.

APPROVED, February 16, 1863.

THIRTY-SEVENTH CONGRESS. SESS. III CH. 119. 1863.

* * *

Chap. CXIX. – *An Act for the Removal of the Sisseton, Wahpaton, Medawakanton, and Wahpakoota Bands of Sioux or Dakota Indians, and for the Disposition of their Lands in Minnesota and Dakota.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized and hereby directed to assign to and set apart for the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux Indians a tract of unoccupied land outside of the limits of any state, sufficient in extent to enable him to assign to each member of said bands (who are willing to adopt the pursuit of agriculture) eighty acres of good agricultural lands, the same to be well adapted to agricultural purposes.

SEC. 2. *And be it further enacted*, That the several tracts of land within the reservations of the said Indians, shall be surveyed, under the direction of the commissioner of the general land-office, into legal subdivisions to conform to the surveys of the other public lands. And the Secretary of the Interior shall cause each legal subdivision of the said lands to be appraised by discreet persons to be appointed by him for that purpose. And in each instance where there are improvements upon any legal subdivision of said lands, the improvements shall be separately appraised. But no portion of the said lands shall be

subject to preemption, settlement, entry, or location, under any act of Congress, unless the party preempting, settling upon, or locating any portion of said lands shall pay therefor the full appraised value thereof, including the value of the said improvements, under such regulations as hereinafter provided.

SEC. 3. *And be it further enacted,* That after the survey of the said reservations the same shall be open to preemption, entry, and settlement in the same manner as other public lands: *Provided*, That before any person shall be entitled to enter any portion of the said lands by preemption or otherwise, previous to their exposure to sale to the highest bidder, at public outcry, he shall become an actual bona fide settler thereon, and shall conform to all the regulations now provided by law in cases of preemption; and shall pay, within the term of one year from the date of his settlement, the full appraised value of the land, and the improvements thereon, to the land officers of the district where the said lands are situated. And the portions of the said reservations which may not be settled upon, as aforesaid, may be sold at public auction, as other public lands are sold, after which they shall be subject to sale at private entry, as other public lands of the United States, but no portion thereof shall be sold for a sum less than their appraised value, before the first of January, Anno Domini eighteen hundred and sixty-five, nor for a less price than one dollar and twenty-five cents per acre, until otherwise provided for by law.

SEC. 4. *And be it further enacted,* That the money arising from said sale shall be invested by the Secretary of the Interior for the benefit of said Indians in their new homes, in the establishing them in agricultural pursuits: *Provided,* That it shall be lawful for said Secretary to locate any meritorious individual Indian of said bands, who exerted himself to save the lives of the whites in the late massacre, upon said lands on which the improvements are situated, assigning the same to him to the extent of eighty acres, to be held by such tenure as is or may be provided by law: *And provided, further,* That no more than eighty acres shall be awarded to any one Indian, under this or any other act.

SEC. 5. *And be it further enacted,* That the money to be annually appropriated for the benefit of the said Indians shall be expended in such manner as will, in the judgment of the Secretary of the Interior, best advance the said Indians in agricultural and mechanical pursuits, and enable them to sustain themselves without the aid of the government; but no portion of said appropriations shall be paid in money to said Indians. And in such expenditure, said Secretary may make reasonable discrimination in favor of the chiefs who shall be found faithful to the Government of the United States, and efficient in maintaining its authority and the peace of the Indians. Said Indians shall be subject to the laws of the United States, and to the criminal laws of the state or territory in which they may happen to reside. They shall also be subject to such rules and

regulations for their government as the Secretary of the Interior may prescribe; but they shall be incapable of making any valid civil contract with any person other than a native member of their tribe, without the consent of the President. The Secretary of the Interior shall also make reasonable provision for the education of said Indians, according to their capacity and the means at his command.

APPROVED, March 3, 1863.

96TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 96-1409

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

SEPTEMBER 26, 1980 – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs submitted the following

REPORT

[To accompany H.R. 7147]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, report favorably thereon with an amendment and recommend than the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); The Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter to be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres
of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall – (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

PURPOSE

The purpose of H.R. 7147, introduced by Mr. Nolan, is to provide that certain lands now held by the United States for the benefit of certain Mdewakanton Sioux Communities of Minnesota.

BACKGROUND

H.R. 7147 provides that the title of the United States to certain lands held for the benefit of certain Mdewakanton Sioux or their descendants will be held in trust for the three existing tribal entities of the Mdewakanton Sioux.

After the Great Sioux Uprising of 1856, Congress enacted legislation in 1888, 1889, and 1890, authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups, who organized under that Act. In order to protect the rights of descendants of those Sioux for whom the 1886 lands were acquired, the constitution and bylaws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs.

H.R. 7147 would eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities.

COMMITTEE AMENDMENT

The Committee adopted an amendment in the nature of a substitute proposed by the Department of the Interior. The only substantive changes that amendment makes is (1) to include a 40 acre tract of land which was inadvertently excluded from H.R. 7147 as introduced and (2) to provide that the Secretary of the Interior would publish in the Federal Register an accurate description of the lands to be transferred rather than setting out the legal description in the bill as introduced.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that all right, title and interest of the United States to certain lands which were acquired for the benefit of certain Mdewakanton Sioux pursuant to three Acts of Congress will be held by the United States in trust for the benefit of three Mdewakanton Sioux Communities in Minnesota.

Section 2 provides that the Secretary of the Interior shall cause an accurate description of such lands to be published in the Federal Register and that such lands will be a part of the reservation of the respective Sioux communities.

Section 3 provides that nothing in the Act shall affect any existing rights in the lands being transferred.

COST AND BUDGET ACT COMPLIANCE

Enactment of H.R. 7147 will result in no cost to the United States. The cost analysis prepared by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 11, 1980.

Hon. MORRIS K. UDALL,
Chairman Committee on Interior and Insular Affairs, U.S. House of Representatives, Longworth House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7147, a bill to provide that certain land of the United States shall be held by the anited States in trust for certain communities of the Mdewakanton Sioux in Minnesota, as ordered reported by the House Committee on Interior and Insular Affairs, September 10, 1980.

The bill would change the legal status of certain parcels of land currently owned by the United States, to that of land specifically held in trust for the three Sioux communities identified in the bill. This technical change in the status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director*.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 7147 will result in no inflationary impact.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee with respect to this legislation and no recommendations were submitted to the Committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by voice vote, recommends approval of the bill, as amended.

DEPARTMENTAL REPORT

The favorable report of the Department of the Interior, dated September 9, 1980, follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

Dear MR. CHAIRMAN: This reports to your request for our views on H.R. 7147, a bill "To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat. 217), March 2, 1889 (25 Stat. 980), and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

(1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and

(3) some 120 acres of land located in Goodhue County in township 114 north, range 15 west, would be held by the United States in trust

for the Prairie Island Indian Community of Minnesota.

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract, lease, or assignment with respect to the land involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be so included – (1) the southwest quarter northeast quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property and, in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am

almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands. . . . (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of $8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by

its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1,000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888, 1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that

the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

THOMAS W. FREDERICK,
Assistant Secretary.

Enclosure.

AMENDMENT TO H.R. 7147
IN THE NATURE OF A SUBSTITUTE

Strike out all after the enacting clause and insert in lieu thereof the following:

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are

hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota, and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall – (1) alter, or require the alteration of, any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Calendar No. 1178

96TH CONGRESS } SENATE { REPORT
2d Session } { No. 96-1047

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

DECEMBER 1 (legislative day, NOVEMBER 20), 1980. –
Order to be printed

Mr. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 7147]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

H.R. 7147 provides that three parcels of land totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the

United States for the use and benefit of the Mdewakanton Sioux Indians under three separate Acts of Congress in the late 1800's shall continue to be held by the United States but in trust for three separate Mdewakanton Sioux communities situated in that State.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were en route to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above, all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities. The rights of individuals whom an interest has already been assigned are protected under the provision of Section 3 of the bill.

BACKGROUND AND NEED

After the Great Sioux Uprising of 1856 Congress enacted legislation in 1888, 1889, and 1890 authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux Tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups who organized under that Act. In order to protect the rights of descendants of those Sioux, for whom the 1886 lands were acquired, the constitution and by-laws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs. In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now, possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing

availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

LEGISLATIVE HISTORY

H.R. 7147 was introduced by Representative Nolan of Minnesota and was favorably reported by the House Committee on Interior and Insular Affairs on September 26, 1980. The bill passed the House and was referred to the Senate Select Committee November 19, 1980. There is no comparable Senate bill.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by a poll of its members on December 1, 1980, by unanimous vote recommends that the Senate pass H.R. 7147 without amendment.

COMMITTEE AMENDMENTS

There are no Committee amendments.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that certain lands totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the United States under three separate Acts of Congress for the use or benefit of certain Mdewakanton Sioux Indians and their descendants are declared to hereafter be held by the United States in trust for three separate Sioux Indian communities. The purpose of this section is to change and clarify the legal status of the lands in question in order to enhance the beneficial use of the lands.

Section 2 provides that the Secretary of the Interior shall publish in the Federal Register a description of the lands involved and provides further that such lands shall be a part of the reservations of the communities for which they are held in trust.

Section 3 provides that noting in this Act shall alter, or require the alteration, of any rights under any contract, lease, or assignment of such lands entered into or issued prior to enactment of this legislation this protects the rights of all persons having a present interest in the lands.

COST AND BUDGETARY CONSIDERATION

The cost estimate for H.R. 7147, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., December 1, 1980.

Hon. JOHN MELCHER,
Chairman Select Committee on Indian Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7147, a bill to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, as ordered reported by the Senate Select Committee on Indian Affairs, December 1, 1980.

The bill would change the legal status of certain parcels of land, currently owned by the United States, to that of land specifically held in trust for the three Sioux communities indentified in the bill. This technical change in the status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director*.

REGULATORY IMPACT STATEMENT

Paragraph 6 of rule XXVII of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

The Committee believes that the bill H.R. 7147 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATION

The Executive Communication of the Department of the Interior dated November 19, 1979, transmitting departmental views on H.R. 7147 to the House of Representatives, is as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: your request for our views on H.R. 7147, a bill "To provide that certain land, of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat. 217), March 2, 1889 (25 Stat. 980), and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

(1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and

(3) some 120 acres of land located in Goodhue County in township 114 north, range 15 west, would be held by the United States in trust for the Prairie Island Indian Community of Minnesota.

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract, lease, or assignment with respect to the lands involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be so included – (1) the southwest quarter northeast

quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property, and in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> "For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be

> expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands . . . " (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of 8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided

in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1.000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for

the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888, 1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which

require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation of

this report from the standpoint of the administration's program.

THOMAS W. FREDERICK,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection (7) of rule XXVII of the Standing Rules of the Senate, the Committee notes that there are no changes in existing law.

94 STAT. 3262

PUBLIC LAW 96-557 – DEC. 19, 1980

Public Law 96-557
96th Congress

An Act

To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such land) which were acquired and are not held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Approved December 19, 1980.

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(5) (4)

Nos. 09-579, 09-580

FEB 9 2010

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In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONSE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

CREIGHTON A. THURMAN
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Attorney for Respondents, The Family Groups of Kimball, Cournoyer, French, Robinette, and Wanna

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

These Respondents support the Petitions of *Sheldon Peters Wolfchild, et al. v. United States,* Docket No. 09-579 (the "Wolfchild Petition"), and *Harley D. Zephier, Senior, et al. v. United States,* Docket No. 09-580 (the "Zephier Petition") for Writs of Certiorari. Accordingly, the "Issues Presented" and "Questions Presented" in the Wolfchild and Zephier Petitions fully agree with the position of the Respondents and therefore we request the Court to grant the relief requested therein.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Plaintiff-Respondents represented (in excess of 1400 individuals).

CORPORATE DISCLOSURE STATEMENT

These Plaintiff-Respondents are not and do not represent a nongovernmental corporation.

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OPINION BELOW

This Responsive Brief is submitted by in excess of 1400 plaintiff heirs of the Loyal Mdewakantons ("Plaintiff-Respondents" or "these Respondents") in support of the Petition for Writ of Certiorari of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579, and the Petition for Writ of Certiorari of *Harley D. Zephier, Senior, et al. v. United States*, Docket No. 09-580.

These Plaintiff-Respondents accept and support the statements of the "Opinion Below" as referenced in those Petitions.

STATEMENT OF JURISDICTION

These Respondents accept and support the "Statements of Jurisdiction" as set forth in the above-identified Petitions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions as set forth in the Petition for Writ of Certiorari filed by Sheldon Peters Wolfchild, et al., are incorporated herein as if fully set forth in this Petition.

STATEMENT OF THE CASE

INTRODUCTION

The family groups of Kimball, Cournoyer, French, Robinette, and Wanna would inform the Court that they fully support the Petition for Writ of Certiorari filed by Sheldon Peters Wolfchild, et al., against the United States, and would incorporate said Petition as if fully set out herein.

That the aforesaid group of respondents respectfully request the Court consider the Petition of the Petitioner and grant the relief sought by the Petitioner.

That the aforesaid family groups did not join the Petitioner in their petition as discussions between counsel for the Petitioner and counsel for the aforesaid family groups determined that there may be a potential appearance of a conflict, and if the matter is returned to the Court of Claims for trial on the merits, the groups may have a different belief as to who the class of beneficiaries should include.

Therefore, pursuant to Rule 12(6), the family groups were served notice, they filed a waiver with this Court on November 24, 2009, indicating that they desired to be a part of the action and considered for relief therefrom. The family groups would inform this Court that the Respondents are listed as Plaintiff Intervenors in the underlying action in the Court of Claims.

FACTUAL BACKGROUND

The above family groups would again support and incorporate as if fully set out herein, the Factual Background set forth in the Petition for Writ of Certiorari filed by Sheldon Peters Wolfchild, et al. against the United States.

RESPONSE FOR GRANTING PETITIONS

As expressed in the Petition for Writ of Certiorari filed for and on behalf of Sheldon Peters Wolfchild, et al., the above family groups support the responses stated in their Petition.

CONCLUSION

The Wolfchild and Zephier Petitions for Writs of Certiorari should be granted, and The Family Groups of Kimball, Cournoyer, French, Robinette, and Wanna concur with all matters set forth in the Writ of Certiorari filed by Erick G. Kaardal.

Respectfully submitted,

CREIGHTON A. THURMAN
THURMAN LAW OFFICE
Counsel of Record
PO Box 897
1800 Broadway Ave.
Yankton, SD 57078
(605) 260-0623

Attorney for Respondents
The Family Groups of
Kimball, Cournoyer, French,
Robinette, and Wanna

Nos. 09-579, 09-580

Supreme Court, U.S.
FILED
FEB 12 2010
OFFICE OF THE CLERK

In The
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SHELDON PETERS WOLFCHILD, et al.,

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vs.

UNITED STATES, et al.,

Respondents.

HARLEY D. ZEPHIER, SR., et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUES PRESENTED

These Respondents support the Petitions of *Sheldon Peters Wolfchild, et al. v. United States, et al.*, Docket No. 09-579 (the "*Wolfchild* Petition"), and *Harley D. Zephier, Sr., et al. v. United States, et al.*, Docket No. 09-580 (the "*Zephier* Petition") for Writs of Certiorari. Accordingly, the following "Statement of Issues Presented" derives from the "Questions Presented" raised in the *Wolfchild* and *Zephier* Petitions. Respondents hereby join in both the *Wolfchild* and the *Zephier* Petitions and adopt by reference, herein, the entirety of said Petitions and supporting material.

This case presents three issues which are of fundamental importance in Indian jurisprudence, and upon which the Federal Circuit's decision departs from the established precedent of this Court and of other Federal Courts:

1. Did the Appropriations Acts of 1888, 1889, and 1890 create a trust for the benefit of the 1886 Mdewakanton Sioux and their descendents (the "1986 Mdewakanton Sioux")?

2. By the passage of the 1980 Act, did Congress intend to terminate that trust?

3. If Congress did so intend, did the termination of the trust constitute a "taking" without just compensation in violation of the Fifth Amendment of the United States Constitution?

LIST OF PARTIES

A list of parties is attached hereto as Appendix C.

CORPORATE DISCLOSURE STATEMENT

These Plaintiffs-Respondents are not and do not represent a nongovernmental corporation.

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OPINION BELOW

This Responsive Brief is submitted by 88 plaintiff heirs of the Loyal Mdewakantons ("Plaintiff-Respondents" or "these Respondents") in support of the Petition for Writ of Certiorari of *Sheldon Peters Wolfchild, et al. v. United States, et al.*, Docket No. 09-579, and the Petition for Writ of Certiorari of *Harley D. Zephier, Sr., et al. v. United States, et al.*, Docket No. 09-580. Respondents hereby join in the Petitions and in all of the arguments made by said Petitions.

These Plaintiff-Respondents accept and support the statements of the "Opinion Below" as referenced in those Petitions.

STATEMENT OF JURISDICTION

These Respondents accept and support the "Statements of Jurisdiction" as set forth in the above-identified Petitions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the February 16, 1863 Act, 12 Stat. 654, Preamble in §§ 1 through 9; March 3, 1863 Act, 12 Stat. 819, Preamble in §§ 1 through 6; 1888, 1889 and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of March 2, 1889, 25 Stat. 980 at 992; Act of August 19, 1890, 26 Stat. 336 at 349; relevant provisions of the original Indian

Reorganization Act of 1934, as amended, 25 U.S.C. § 462, 463, 465 and 479, Indian Reorganization Act of 1934 (as reprinted in *Wolfchild* Petition Appendix at 159-160); and the Act of December 1980, Pub. L. 9-557, 94 Stat. 3262.

STATEMENT OF THE CASE

INTRODUCTION

This case involves the misapplication of settled principles of Indian trust law by the Federal Circuit, resulting in the "taking" of approximately one thousand acres of prime land, which, because of the institution of Indian gaming, is worth millions of dollars in annual revenues, from the descendents of the loyal Mdewakanton Sioux Indian people who risked their lives, and forfeited their property and tribal relationships, to save whites during the Sioux Uprising of 1862 in Minnesota.

FACTUAL BACKGROUND

The Appropriation Acts[1] were intended to compensate those Mdewakanton Sioux who risked their lives to rescue whites during the Minnesota Uprising of 1862, and who thereby completely alienated themselves from their own Sioux tribal communities and were left to fend for themselves in a white man's

[1] *Wolfchild* Petition, App. 154-156.

culture. During the Uprising of 1862, some of the Sioux had remained loyal to the United States Government. These Sioux people were not only loyal to the Government, but they risked their lives by rescuing white settlers. By these acts of courage, they lost not only their homes and property, but they severed their relationships with their own people. Congress recognized that, if they returned to their own tribes, they would be slaughtered. Recognizing their great sacrifice, in 1863, in the same legislation in which it abrogated the Sioux treaties, forfeited the Sioux reservations and terminated their annuities, Congress authorized the Department of the Interior to set apart up to eighty acres of public lands for each of the loyal Mdewakanton Sioux, to be set apart, or allotted, to each of the loyal Sioux "and their heirs forever." It further provided that the land " . . . shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be alienated or devised, except by the consent of the President."[2] When, by 1888, the Secretary had not allocated those acreages, and recognizing that, when it forfeited the treaties and annuities, Congress had rendered the loyal Mdewakanton Sioux homeless and penniless, Congress, in the Appropriation Acts, appropriated funds and required the Secretary to use those funds to buy land, cattle, horses and implements for the loyal Mdewakanton Sioux. What is especially significant for our case, Congress mandated that each loyal

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[2] 12 Stat. 652, *Wolfchild* Petition, App. 8.

Mdewakanton Sioux was to receive as close to an equal benefit from the land as practicable. To further insure that the loyal Mdewakanton Sioux would benefit from this appropriation, to further demonstrate Congress's intent to benefit all of the loyal Mdewakanton Sioux, and to guard against the inaction of the Department of Interior, Congress mandated that the money be used to support both full and half blooded Indians, and that the funds carry over from year to year, if they were not all spent in the fiscal year in which they were appropriated. The Appropriation Acts were enacted to provide a substitute for the benefits which the 1886 Mdewakanton Sioux lost because they have give up their "vested" tribal status, which is a significant factor, in light of the fact that the Federal Circuit held that they had no "vested" interest in the lands purchased with those appropriations.

REASONS FOR GRANTING PETITIONS

As expressed in the Petitioners' arguments, in which these Respondents join, and supported by the following Respondents' arguments, in order to reach its result the Federal Circuit Court of Appeals misapplied the precedent of this and other Federal Courts as follows:

(1) The Federal Circuit departed from the precedent of this Court, and other Federal Courts, in holding that the Authorization Acts did not create a trust

relationship, and did not confer upon the 1886 Mdewakanton Sioux, as a collective group, a vested right to share in the benefits of the 1886 Lands, thereby depriving the 1886 Mdewakanton Sioux of a remedy for a deprivation of their statutorily conferred rights.

(2) The Federal Circuit's conclusion that it was the intention of Congress, by passage of the 1980 Act, to terminate the existing trust, and to thereby divest ninety percent (90%) of the descendents of the 1886 Mdewakanton Sioux of their interest in the 1886 Lands, was clearly in error, and ignored long-standing Indian treaty and trust law.

(3) If it was the intention of Congress, by the passage of the 1980 Act, to terminate the existing trust, the termination of the trust, and the divestiture of ninety percent of the descendents of the 1886 Mdewakanton Sioux of their interest in the 1886 Lands, under the established standards of the Court, constituted a taking without just compensation in violation of the Fifth Amendment of the United States Constitution.

These Respondents therefore support Petitioners' prayer for review and reversal of the Federal Circuit's opinion, as argued more fully below.

I. The Federal Circuit Departed from the Precedent of this Court, and other Federal Courts, in Holding that the Authorization Acts Did Not Create a Trust Relationship, and Did Not Confer Upon the 1886 Mdewakanton Sioux, as a Collective Group, a Vested Right to Share in the Benefits of the 1886 Lands, thereby Depriving the 1886 Mdewakanton Sioux of a Remedy for a Deprivation of their Statutorily Conferred Rights.

The decision of the Federal Circuit erroneously applied the principles established by the decisions of this Court and of the various Circuits relating to the creation of statutory trusts for Native American people, thus creating confusion in that area of the law, and depriving the 1886 Mdewakanton Sioux of a vested statutory benefit, worth billions of dollars, without any compensation.

To determine Congressional intent, the Authorization Acts must be analyzed in historical context. The Federal Circuit failed to properly undertake that analysis. As a result, the Federal Circuit ignored the intent of Congress, made apparent over the course of many years, to do justice to the 1886 Mdewakanton Sioux and their descendents.

Those Acts were intended to compensate those Mdewakanton Sioux, and their descendents, who risked their lives to rescue whites during the Uprising of 1862, and who thereby completely alienated themselves from their own Sioux tribal communities

and were left to fend for themselves in a white man's culture. They were intended as a substitute for the benefits they lost by forfeiting their tribal status. By these acts of courage, they lost not only their homes and property, but they severed their relationships with their own people. Congress recognized that, if they returned to their own tribes, they would be slaughtered. Recognizing their great sacrifice, in 1863, in the same legislation in which it abrogated the Sioux treaties, forfeited the Sioux reservations and terminated their annuities, Congress authorized the Department of the Interior to set apart up to eighty acres of public lands for each of the loyal Mdewakanton Sioux, to be set apart, or allotted, to each of the loyal Sioux "and their heirs forever."[3] This obviously demonstrates an intention to benefit the loyal Mdewakanton Sioux with the fruits of allotted land, on a permanent basis, accruing to their descendents "and their heirs forever." It further provided that the land " . . . shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be alienated or devised, except by the consent of the President." This demonstrates an intention to create a trust relationship, to protect the loyal Mdewakanton Sioux from those who would take advantage of them. When, by 1888, the Secretary had not allocated those acreages, and recognizing that, when it forfeited the treaties and annuities, Congress had rendered the loyal Mdewakanton Sioux homeless

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[3] 12 Stat. 652, *Wolfchild* Petition, App. 8.

and penniless, Congress appropriated funds, and required the Secretary to use those funds, to buy land, cattle, horses and implements for the benefit of the loyal Mdewakanton Sioux.[4] The Federal Circuit failed to read the Appropriation Acts in the context of their legislative precursor, the 1863 Bill. What is especially significant for our case, Congress, in the Appropriation Acts, mandated that each loyal Mdewakanton Sioux was to receive as close to an equal amount, in value, from this appropriation, as practicable. Congress thereby clearly expressed its intention that the Department use the land, or manage the land, for the equal, collective benefit of all the loyal Mdewakanton Sioux, which is as clear an invocation of trust status as possible, without the express use of the term "trust." To further insure that the loyal Mdewakanton Sioux would benefit from this appropriation, and further demonstrating Congress's intent to benefit all of the loyal Mdewakanton Sioux, and to guard against the inaction of the Department of Interior, Congress mandated that the money be used to support both full and half blooded Indians, and that the funds carry over from year to year, if they were not all spent in the fiscal year in which they were appropriated. The Appropriation Acts were enacted to provide a substitute for the benefits which the 1886 Mdewakanton Sioux lost because they gave up their tribal status to rescue whites – as a substitute for

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[4] *Wolfchild* Petition, App. 154-156.

tribal "trust" status, carrying all of its benefits and protections.

The Federal Circuit's conclusion that "nothing in the legislative history of the three provisions at issue . . . indicates that they were designed to create a trust relationship . . . " is thus simply erroneous. As indicated, the acknowledged precursor of the Appropriation Acts was the 1863 Bill. In fact, the Appropriation Acts were enacted, in part, to remedy the failure of the Secretary of the Interior to set apart the lands called for by the 1863 Bill. This was certainly an important part of the legislative history of the Appropriation Acts. That precursor Bill specifically protected that land against alienation and encumbrance, and provided that the land " . . . shall be an inheritance to said Indians and their heirs forever." The intent of Congress, in passing the Appropriation Acts, certainly must be analyzed in the context of this precursor Bill, a Bill which was not implemented by the Department, and which non-implementation the Appropriation Acts were intended to correct. Had the Secretary purchased the land, pursuant to the 1863 Bill, as the Secretary did, pursuant to the Appropriation Acts, it certainly cannot be questioned that it was the clear intention of Congress to create a trust by the 1863 Bill, even though neither of the Bills explicitly refer to a "trust."

Further, in 1886, Congress again appropriated funds for the purchase of lands for the loyal Mdewakanton Sioux. The Secretary purchased lands and transferred those lands outright to various loyal

Mdewakanton Sioux in fee simple ownership. The Department discontinued that process, when the loyal Mdewakanton Sioux sold or abandoned their lands. This led to the Appropriation Acts.[5] This history supports the conclusion that Congress intended to create what is referred to in the general practice of law as a "spendthrift" trust, one that is designed to be protected from alienation or encumbrance, and to continue to be held for many years for the benefit of the beneficiaries.

There is no question that the Appropriation Acts expressly contained all of the elements of a trust created for the benefit of the 1886 Mdewakanton Sioux. A trust arises out of the nature of the relationships created by the Acts. The Acts authorized the Secretary of the Interior to purchase lands, and mandated that the Department of the Interior use the lands for the benefit of the 1886 Mdewakanton Sioux. That is the classic language for the creation of a trust relationship, the beneficiaries of which were the collective group known as the 1886 Mdewakanton Sioux. However, Congress went even further. It also required that the Department of the Interior, to the degree practicable, use (or manage) the land so that all of the 1886 Mdewakanton Sioux would benefit equally from the appropriation used to purchase the land. To argue that these Acts created anything but

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[5] *Wolfchild, et al. v. United States, et al.*, 559 F.3d 1228, 1233 (Fed. Cir. 2009).

an express trust relationship is to ignore the express language used by Congress. To argue that the Acts did not give rise to any substantive rights in the 1886 Mdewakanton Sioux, either individually or as a collective group, is to ignore the consistent mandates of Congress and the consistent rulings of the Courts, which have given Native American people, who have suffered deprivations arising out of treaty and statutory violations, a remedy in the Court of Claims. There can be no question that, had the Secretary, after purchasing the lands, decided to open them up to white settlers, the 1886 Mdewakanton Sioux would have had a cause of action against the Secretary for breach of his obligations created by the Acts. It is clear that the 1886 Mdewakanton Sioux were granted enforceable, substantive rights and they were the beneficiaries of a statutorily created trust.

The fact that the Secretary had the discretion as to "how" to use the purchased land for the benefit of the 1886 Mdewakanton Sioux, the fact that the Secretary was given "minimal direction" as to how to manage the land for their benefit, does not affect the question of "whether" it should be used for that purpose. This is what some courts have referred to as a "bare" or a "limited" trust. It did not provide management instructions for the Secretary. The Secretary had a great deal of discretion as to "how" to manage, or to use, the trust lands for the benefit of the 1886 Mdewakanton Sioux. However, the Secretary did not have any discretion to completely divest the 1886 Mdewakanton Sioux of their interest in the

lands. That is, in essence, what the Government argues to be the effect of the Bill which the Department proposed to Congress in 1980 – that the lands should be taken from 90% of the descendents of the 1886 Mdewakanton Sioux, and given over to 10% of those descendents, as well as to some who were not even descendents of the 1886 Mdewakanton Sioux, a fact which the Department apparently did not reveal to Congress in the process of proposing the legislation.

The concept of the "bare" or "limited" trust was the subject of this Court's decision in the case of *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961 (1983) ("*Mitchell II*"), which the Federal Circuit did not properly apply. This Court, in *Mitchell II*, held that the General Allotment Act, although it does not contain detailed directives as to management, created a "limited" trust relationship that "prevents improvident alienation of the allotted lands." The Appropriation Acts, to correct prior problems with outright transfer of land arising out of its alienation or destruction, created a limited trust to prevent improvident alienation of the lands allotted to the 1886 Mdewakanton Sioux. For ninety years, the trust arrangement fulfilled the Congressional purpose – it prevented the alienation of the land. Then, in 1980, just at the time when the 1886 Mdewakanton Sioux, because of the Indian Gaming Act, were on the cusp

of realizing some true benefit from the 1886 lands,[6] the very trustee appointed by Congress to protect the 1886 Mdewakanton Sioux from the "improvident alienation" of their lands, the Secretary of the Department of Interior, according to the Government's argument, violated that trust. The Secretary proposed a Bill that "alienated" the land. The Bill divested 90% of the intended beneficiaries of any and all interest in, or benefit from, the 1886 lands. The Bill did not simply call for the "management" of the land, as alleged in *Mitchell II*. It did not simply result in the more equitable allocation of royalty revenues, as in *United States v. Jim*.[7] According to the Government's construction, it resulted in an outright "taking" of a vested right to the benefits of the 1886 lands without just compensation, which, as will be argued hereafter, is in specific violation of the Fifth Amendment of the United States Constitution. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S.Ct. 2716 (1980).

The Federal Circuit decision thus confuses the question of the "existence" of a trust, with the question of the "type of trust" that Congress intended to create. This Court, in *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*"), and *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*), and *United States v. White Mountain Apache*

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[6] *Wolfchild, supra*, at 1235.

[7] 409 U.S. 80, 93 S.Ct. 261 (1972).

Tribe, 537 U.S. 465, 123 S.Ct. 1126 (2003), clarified the difference between a "limited" or "bare" trust, and a "conventional" trust, which has all of the hallmarks of a fiduciary relationship. A "bare" trust is one in which the statute gave the United States no "functional obligations", such as managing timber, for the benefit of the beneficiaries. A "bare" trust is one in which, for example, the Department has no managerial responsibilities but which exists merely to "prevent alienation of the land" and to guarantee immunity from state taxes. Because Congress did not assign any "managerial" duties or "directions" to the Department, the Federal Circuit held that the land was not held in trust. However, there was no question that Congress intended a trust, if only a "bare" or a "limited" trust, a trust which exists to prevent the alienation of the land. A "bare" trust is still a trust, imposing a duty upon the trustee to "prevent alienation of the land." In this case, the trustee violated that duty. The trustee "alienated" the land, taking it away from 90% of its intended beneficiaries, and granting an interest in the land to beneficiaries who are not proper beneficiaries of the land.

The Federal Circuit ignores the fact that the Secretary actually purchased land that was to be used for the equal benefit of the 1886 Mdewakanton Sioux. Once the land was purchased, a general "appropriation" provision becomes a "trust" provision. The legal title to that land was in the United States. There was a trust "res" or "corpus." This was not a case where the Secretary was given authority to

expend funds generally for the welfare of the Indians, or to buy only implements, livestock or seed. The Secretary was given the authority to buy land, and if the Secretary exercised that authority and bought land, the statutes created a statutory duty, in the Secretary, to use it for the equal benefit of the 1886 Mdewakanton Sioux. The Secretary had the discretion as to "how" to use that land for the equal benefit of the 1886 Mdewakanton Sioux, but the Secretary did not have the discretion "whether" to use it for their equal benefit. To argue that they had no collective "vested" interest in the land is therefore clearly erroneous.

It is also significant that the Federal Circuit's opinion summarily dismissed the repeated provisions of the Appropriation Acts which expressly mandated that if the Secretary purchased land, the Secretary was required to assure that " . . . all of said money which is to be expended for lands shall be so expended that each of the Indians shall receive, as nearly as practicable, an equal amount in the value of the appropriation." This statutory mandate was basically ignored because there is no way it can be considered as imposing anything other than a fiduciary obligation on the Secretary of the Interior to use the land so that each of the 1886 Mdewakanton Sioux receive an equal benefit from the land. A persuasive argument can be made that, over the years of the application of the statute, the mandate was not carried out. Allowing a small number of 1886 Mdewakanton Sioux to occupy the land certainly cannot be said to provide for the equal benefit of all. In 1980, the

Secretary of the Interior had an opportunity to correct that injustice. The Secretary could have proposed to Congress that the land be granted, in trust, to the three post-1934 tribal communities on the condition they open their membership up to any of the descendents of the 1886 Mdewakanton Sioux who could prove their status as descendents, and on the condition that the income from the 1886 lands not be distributed among members who were not 1886 Mdewakanton Sioux. Because the Secretary did not so propose, and because Congress did not enact such a condition upon the grant, according to the Government's argument, 90% of the 1886 Mdewakanton Sioux were completely deprived of the benefit of the 1886 lands, which Congress had specifically mandated be used and managed for the equal benefit of all 1886 Mdewakanton Sioux.

The Federal Court refers to the "minimal directives" of the Appropriation Acts, in support of a conclusion that there was no intent to create a trust. Whether the directives are "minimal" is irrelevant. The important thing is that the mandate of the Acts is direct, express and unequivocal. The Secretary is to use the lands for the equal benefit of all of the 1886 Mdewakanton Sioux. Repeated in two of the three Appropriation Acts is the requirement that the Secretary, as nearly as practicable, see to it that each of the beneficiaries receives an equal amount in benefit from the lands purchased. As indicated, that

statutory injunction is repeated in both the 1889 and the 1890 Appropriation Acts.[8] They clearly express a congressional intent that, if the Secretary decides to use, or manage, the lands for the collective benefit of the 1886 Mdewakanton Sioux and their descendents, the Secretary must do so in a manner in which they will all share equally in its benefits. If the Secretary had elected to use the land for the collective benefit of the 1886 Mdewakanton Sioux, for example, by renting the land, he was expressly required, by the Appropriation Acts, to distribute those proceeds equally to the beneficiaries, the 1886 Mdewakanton Sioux.

In its effort to support its conclusions, the Federal Circuit attempts to minimize the "duties" created by the Appropriation Acts. As indicated, the Court refers to the "minimal directives" of the Appropriation Acts. In an apparent acknowledgement that the Secretary was given certain mandates with respect to the land purchased, the Federal Circuit refers to them as "statutory use restrictions" rather than fiduciary responsibilities. The Federal Circuit also characterized this as a "change in the identity of the beneficiaries," and held that a change in the identity of the beneficiaries does not constitute a taking.[9] To characterize the exclusion of 90% of the statutorily intended beneficiaries, and the inclusion of a number

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[8] *Wolfchild* Petition, App. 154-156.

[9] *Wolfchild*, *supra*, at 1258.

of beneficiaries who were not authorized by statute, as a "change in identity of the beneficiaries," as argued by the Government, especially in light of the statutory mandate that the beneficiaries be treated equally, simply defies logic. As will be argued hereafter, it was a "taking" completely without compensation.

No matter how the language is parsed, there is no avoiding the conclusion that Congress directed the Secretary to use the land in such a fashion so that each of the 1886 Mdewakanton Sioux receive "an equal amount of value" from the land in question, and that the Secretary violated that mandate.

The Federal Circuit further concludes that these beneficiaries had an "expectation of benefit," but no "vested rights" in the property. It is the position of Petitioners that the 1886 Mdewakanton Sioux, as a collective group, had a "vested" interest in the 1886 lands. There is no question that individual 1886 Mdewakanton Sioux Indians were not vested with ownership, in the sense of a fee simple interest. However, the 1886 Mdewakanton Sioux, as a group, were given a "fixed and immediate right of present or future enjoyment" of the lands. Black's Law Dictionary. As indicated, if the Secretary had decided to open the 1886 lands to white settlers, there is no question that the 1886 Mdewakanton Sioux would have a claim against the Secretary for violation of his statutory duties.

The Federal Circuit misapplied the decision of this Court in *United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261 (1972). The Federal Circuit cited this case for the proposition that "Because that arrangement did not give vested rights to the land to any of the descendants of the 1886 Mdewakantons, Congress was free to alter the ownership status of the land to create trusts for the three communities." In the first place, the Federal Circuit was incorrect in its conclusion that the Appropriation Acts did not give any vested rights to the descendents of the 1886 Mdewakanton Sioux. In Section 1 of the Section-by-Section Analysis of the Act of 1980, Congress declared: " . . . certain lands totaling approximately 1,000 acres situated in the State of Minnesota were acquired by the United States under three separate Acts of Congress for the use and benefit of certain Mdewakanton Sioux Indians and their descendents. . . ."[10] By Congress's own statement, the Appropriation Acts gave a vested interest, as beneficiaries of the statutory trust, to the 1886 Mdewakanton Sioux and their descendents. The Court cited the above case as an example of an "alteration of ownership status of the land" which would not give rise to a cause of action. The case of *United States v. Jim*, however, dealt with a federal statute which amended a previous federal statute. The previous statute provided that a certain percentage of the mineral royalties from tribal land

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[10] Report, App. 1.

should be used for the health and general welfare of the Navajo of a certain county. The amended statute expanded the pool of beneficiaries, so that the royalties would be used to benefit the Navajo on the entire reservation. This is very different from an Act that completely divests 90% of the beneficiaries of the land of any interest in or any benefit from the land, the benefits from which, because of the gambling revenues, are worth a considerable amount of money. The Court, in *United States v. Jim*, specifically pointed out that Congress had not deprived the Navajo of the benefit of the royalties, but had simply reallocated them in a more equitable manner. The Court was careful to qualify its decision: "We intimate no view as to the rights a tribe might have if Congress were to deprive it of the value of mineral royalties generated by tribal lands."[11]

The subsequent words and actions of the Department of the Interior, carrying out the mandates of the Appropriation Acts, up until 1980, further support the conclusion that that the Department thought that Congress had intended a limited trust relationship. As indicated, the very reason the Secretary of the Interior adopted the assignment system was to use the land for the benefit of the 1886 Mdewakanton Sioux without allowing them to alienate or encumber it. The title to the land was held by the United States

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[11] *United States v. Jim*, 409 U.S. 80, fn.3, 93 S.Ct. 261 (1972).

because the Department of the Interior, based upon past experience with granting fee simple title, feared that sale or the destruction of the property if the United States did not remain the legal owner and in control of the use of the property. That is in the nature of a "spendthrift" trust, where the trustee retains legal title in order to protect the beneficiary from his own actions endangering his continued benefit from the land. The Federal Circuit admits that the Interior Department officials repeatedly characterized the 1886 lands as being held in trust.[12] The Department further treated the land as if it were held in trust. When it was necessary sell a parcel of the 1886 lands, the Bill authorizing sale required the written consent of all of the beneficiaries residing in the County. Act of Feb. 25, 1901, 31 Stat. 805, 806. When the land was not under assignment, it was leased, and the proceeds were held in accounts for the benefit of the lineal descendents of the 1886 Mdewakanton Sioux.[13] Even the constitution and bylaws of the three tribal communities recognized the trust status, creating two classes of membership, one of which consisted of the descendants of the 1886 Mdewakanton Sioux "who had exclusive rights to the benefits of the 1886 lands."[14]

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[12] *Wolfchild*, *supra*, at 1241.

[13] Plaintiff's Exhibit 29, at 5-6.

[14] H.R. Rep. No. 96-1409 (1980), App. 2.

II. Whether the Federal Court's Conclusion that it Was the Intention of Congress, by Passage of the 1980 Act, to Terminate the Existing Trust, and to thereby Divest Ninety Percent (90%) of the Descendents of the 1886 Mdewakanton Sioux of their Interest in the 1886 Lands, Was Clearly in Error, and Ignored Long-Standing Indian Treaty and Trust Law.

The Federal Circuit was required to interpret the 1980 Act in a manner that would render its application clearly constitutional. *Edmond v. United States*, 520 U.S. 651, 658, 117 S.Ct. 1573 (1997). As Justice Holmes stated: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy,* 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916); *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S.Ct. 1219 (1998).

As will be argued below, the Federal Circuit's interpretation of the 1980 Act results in a "taking" without just compensation, in violation of the Fifth Amendment of the United States Constitution. The question is: can the Act be interpreted in a manner so as to render it constitutional? Petitioner believes that it can.

The Act of 1980 provides:

> " . . . all right, title and interest of the United States in those lands . . . which were

> acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under . . . (the Appropriation Acts), are hereby declared to hereafter be held by the United States – (1) . . . 258.25 acres . . . in trust for the Shakopee Mdewakanton Sioux Community . . . ; (2) . . . 572.5 aces . . . in trust for the Lower Sioux Indian Community . . . ; and (3) . . . 120 acres . . . in trust for the Prairie Island Indian Community. . . ."[15]

It is obvious that the Act does not change the status of the United States as trustee over the 1886 lands. As concluded by the Federal Circuit, 95% of the enrolled members of the three communities are 1886 Mdewakanton Sioux or their descendents, and were thus proper beneficiaries of the Appropriation Acts. The problem is that the enrolled tribal membership of the three tribes excludes 90% of the 1886 Mdewakanton Sioux, a fact of which there is no indication Congress was aware. The question is: can the Act be interpreted to require the United States, as Trustee, to include those 1886 Mdewakanton Sioux, who are excluded from tribal membership in the three tribes, as continuing beneficiaries of the Trust. The Act does not expressly terminate the benefits of those 1886 Mdewakanton Sioux who were not members of those three tribes. Congressional intent to authorize the extinguishment of trust status must

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[15] *Wolfchild* Petition, App. 154-156.

be "plain and unambiguous," *United States ex rel. Hualpai Indians v. Santa Fe Pacific R. Co., supra*, 314 U.S., at 346, 62 S.Ct., at 251 (1941). It either "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973)." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 105 S.Ct. 2587 (1985).

Such intent certainly is not plain and unambiguous in the language of the Act. The Act merely provides that the 1886 lands, which had been held by the United States in trust for the 1886 Mdewakanton Sioux, were to be held in trust for the three tribal communities, 95% of whose members were 1886 Mdewakanton Sioux. It does not state that the interest of the remaining 1886 Mdewakanton Sioux, 90% of the total number of 1886 Mdewakanton Sioux, should be extinguished and terminated. The purpose of the Bill, as stated in the Committee Report, was to eliminate the "checkerboard pattern of land" whereby land assigned to 1886 lands were interspersed with other tribal land, diminishing the effectiveness of overall land management.[16] Further, the 1886 lands were either assigned to the 1886 Mdewakanton Sioux, or had to remain available for assignment by the Department of the Interior. This prevented the encumbering of the land, or the long-term lease of the

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[16] H.R. Rep. No. 96-1409 (1980), App. 2.

land, for the purpose of effective commercial development. Transferring the 1886 lands to the control of the tribes, however, under the overall trusteeship of the United States, would allow the commercial development of the land for the enhanced benefit of the beneficiaries. As stated by the Director of the Office of Management and Budget, this was viewed a "technical change in status . . . to facilitate community development on the reservations."[17] In fact, it enabled the Shakopee tribe to develop a very lucrative casino gaming operation on the land. This very beneficial purpose of the legislation, however, can still be accomplished without divesting the 1886 Mdewakanton Sioux of the benefits of the land. It has to do with the unified management of the land, not with the identity of the beneficiaries. As indicated, the United States is the continuing Trustee of those lands. It certainly is not inconsistent with the terms, or the purpose of the Act of 1980, to interpret that Act consistent with the United States Constitution, to afford a continuing beneficial interest in the 1886 lands under the Trusteeship of the United States, to the 1886 Mdewakanton Sioux who are not enrolled members of the tribes and who, in fact, have been purposely excluded from membership in the tribes. See *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996). It would require that some arrangement must be negotiated between the United States, as Trustee, for the benefit of the 1886 Mdewakanton Sioux who are not enrolled

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[17] *Id.*

members of the tribes, and the tribes, as to the amount of net proceeds from the 1886 lands which should be made available for payment by the United States to the 1886 Mdewakanton Sioux who are not enrolled members of the tribes, taking into account multiple factors, including the risk assumed by the tribe in pursuing the development of the property.

III. If Congress Did so Intend, the Termination of the Trust Constituted a "Taking" Without Just Compensation in Violation of the Fifth Amendment of the United States Constitution.

If the 1980 Act is interpreted to divest 90% of the 1886 Mdewakanton Sioux of their interest in the 1886 lands, the Act results in a taking without just compensation, in violation of the Fifth Amendment of the United States Constitution. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S.Ct. 2716 (1980). In *Sioux Nation*, this Court reconciled two seemingly divergent lines of authority pertaining to actions of Congress impacting the property rights of Indian people. One line of authority, exemplified by the early case of *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), recognized Congress's paramount power over the property of the Indians, express and implied, by reason of its exercise of guardianship over their interests, even where the Congressional action is not in accord with the strict letter of a treaty. The second line was exemplified by the more recent decision in *Shoshone Tribe v. United*

States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937). In that case, the Court conceded Congress's paramount power over Indian property, but holds, nonetheless, that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'" *Id.*, at 497, 57 S.Ct., at 252 (quoting *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S.Ct. 681, 684, 79 L.Ed. 1331 (1935)).

As previously argued, the Federal Circuit attempts to fit Congress's action, in adopting the 1980 Act, in the former line of cases, involving the mere "management" of the property. The Federal Circuit characterizes the directions of Congress as mere "statutory use restrictions", rather than fiduciary responsibilities. The Federal Circuit also characterized this as a "change in the identity of the beneficiaries", and held that a change in the identity of the beneficiaries does not constitute a taking. As argued, to characterize the exclusion of 90% of the statutorily intended beneficiaries, and the inclusion of a number of beneficiaries who were not authorized by statute, as a "change in identity of the beneficiaries," especially in light of the statutory mandate that the beneficiaries be treated equally, is simply unreasonable. The Federal Circuit cites the case of *United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261 (1972) to support the argument that Congress can "dilute the ownership" of a class of beneficiaries without committing an unconstitutional "taking." Again, to

argue that exclusion of 90% of the intended beneficiaries is a "dilution of ownership" simply defies logic. If the 1980 Act is interpreted as the Federal Circuit interpreted it, it resulted in a "taking" without compensation. The "taking" is especially onerous when one considers the fact the land has proven so valuable as a base for gaming operations, that the enrolled members of the Shakopee tribe, which purposely refused to admit 1886 Mdewakanton Sioux people who were not previously enrolled, to membership in the tribe, each receive a distribution of $400,000 per year from the tribal gaming operations.

CONCLUSION

The *Wolfchild* and *Zephier* Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Calendar No. 1178

96TH CONGRESS *2d Session* | SENATE | REPORT No. 96-1047

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

DECEMBER 1 (legislative day, NOVEMBER 20), 1980.
Order to be printed

MR. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 7147]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

H.R. 7147 provides that three parcels of land totaling approximately 1,000 acres situated in the

State of Minnesota which were acquired by the United States for the use and benefit of the Mdewakanton Sioux Indians under three separate Acts of Congress in the late 1800's shall continue to be held by the United States but in trust for three separate Mdewakanton Sioux communities situated in that State.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were en route to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above, all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities. The rights of individuals whom an interest has already been assigned are protected under the provision of Section 3 of the bill.

BACKGROUND AND NEED

After the Great Sioux Uprising of 1856 Congress enacted legislation in 1888, 1889, and 1890 authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux Tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups who organized under that Act. In order to protect the rights of descendants of those Sioux, for whom the 1886 lands were acquired, the constitution and by-laws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs. In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now, possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing

availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

LEGISLATIVE HISTORY

H.R. 7147 was introduced by Representative Nolan of Minnesota and was favorably reported by the House Committee on Interior and Insular Affairs on September 26, 1980. The bill passed the House and was referred to the Senate Select Committee November 19, 1980. There is no comparable Senate bill.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by a poll of its members on December 1, 1980, by unanimous vote recommends that the Senate pass H.R. 7147 without amendment.

COMMITTEE AMENDMENTS

There are no Committee amendments.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that certain lands totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the United States under three separate Acts of Congress for the use or benefit of certain Mdewakanton Sioux Indians and their descendants are declared to hereafter be held by the United States in trust for three separate Sioux Indian communities. The purpose of this section is to change and clarify the legal status of the lands in question in order to enhance the beneficial use of the lands.

Section 2 provides that the Secretary of the Interior shall publish in the Federal Register a description of the lands involved and provides further that such lands shall be a part of the reservations of the communities for which they are held in trust.

Section 3 provides that nothing in this Act shall alter, or require the alteration, of any rights under any contract, lease, or assignment of such lands entered into or issued prior to enactment of this legislation this protects the rights of all persons having a present interest in the lands.

COST AND BUDGETARY CONSIDERATION

The cost estimate for H.R. 7147, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., December 1, 1980.

Hon. JOHN MELCHER,
Chairman Select Committee on Indian Affairs,
US Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974. the Congressional Budget Office has reviewed H R 7147, a bill to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota as ordered reported by the Senate Select Committee on Indian Affairs, December 1, 1980.

The bill would change the legal status of certain parcels of land, currently owned by the United States, to that of land specifically held in trust for the three Sioux communities identified in the bill. This technical change in status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 6 of rule XXVII of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

The Committee believes that the bill H.R. 7147 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATION

The Executive Communication of the Department of the Interior dated November 19, 1979, transmitting departmental views on H.R. 7147 to the House of Representatives, is as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: your request for our views on H.R. 7147, a bill "To provide that certain land, of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat.217), March 2, 1889 (25 Stat. 980) and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

(1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and

(3) some 120 acres of land located in Goodhue County in township 114 north, range 15west, would be held by the United States in trust for the Prairie Island Indian Community of Minnesota.

(4)

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract lease, or assignment with respect to the lands' involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be

so included – (1) the southwest quarter northeast quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property, and in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> "For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in

> said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands . . . " (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of 8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under

the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1,000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is

governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888,1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888,1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which

require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation

of this report from the standpoint of the administration's program.

THOMAS W. FREDERICK,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection (7) of rule XXVII of the Standing Rules of the Senate, the Committee notes that there are no changes in existing law.

APPENDIX B

96TH CONGRESS *2d Session* | HOUSE OF REPRESENTATIVES | REPORT No. 96-1409

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

SEPTEMBER 26, 1980 – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs submitted the following

REPORT

[To accompany H.R. 7147]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

> That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); The Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter to be held by the United States –
>
> > (1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota; and
> >
> > (2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and
> >
> > (3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

PURPOSE

The purpose of H.R. 7147, introduced by Mr. Nolan, is to provide that certain lands now held by the United States for the benefit of certain Mdewakanton Sioux Communities of Minnesota.

BACKGROUND

H.R. 7147 provides that the title of the United States to certain lands held for the benefit of certain Mdewakanton Sioux or their descendants will be held in trust for the three existing tribal entities of the Mdewakanton Sioux.

After the Great Sioux Uprising of 1856, Congress enacted legislation in 1888, 1889, and 1890, authorizing the appropriation of funds to acquire lands for

members of the Mdewakanton Sioux tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups, who organized under that Act. In order to protect the rights of descendants of those Sioux for whom the 1886 lands were acquired, the constitution and bylaws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs.

HR 7147 would eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities.

APPENDIX C

LIST OF PLAINTIFFS

Marvel Jean DuMarce et al.

DuMarce	Surname	First Name	Middle Name
1	DuMarce	Marvel	Jean
2	Bursheim	Donna	Faye
3	Selvaqe Jr.	Michael	Ira
4	LaBelle	Paige	Reriae
5	Nicolai a.k.a. Nicoloi	Valencia a.k.a. Velencia	Anita
6	Selvage	Ira	Joseph Murphy
7	Selvaqe	Tilrner	Kenneth
8	Selvaqe	Shalaine	Paris Marie
9	Selvaqe	Sabre	Kenneth
10	Selvaqe	Saden	John
11	Farmer	Stevie	Dawn
12	Shepherd	Austin	Blaine
13	Quinn	Tayonna	Felicia Lashae
14	DuMarce	Jarrod	Kenneth
15	Bursheim	Whitney	DeVon
16	White	Kyan	James
17	Farmer	Sara	Louise
18	Farmer	Janiya	Faye
19	Farmer	Gabrielle	Joy
20	Bursheim	Donita	Mae
21	Goodsell Sr.	Jared	Marshall

22	Marlow	Aliyah	Jean
23	Goodsell Jr.	Jared	Marshall
24	Goodsell	Gracie	Lydia
25	Goodsell	Marshall	Jared
26	Goodsell	Jace	Marshall
27	Bursheim Jr.	Kenneth	Duwayne
28	Bursheim	Julian	John
29	Bursheim III	Kenneth	Duwayne
30	Bursheim	Beverly	Jean
31	Bursheim	Keith	Benjamin
32	Bursheim	DeVon	Belle
33	Bursheim	Bailyn	John
34	BraveBull	Belle	Sheldon
35	BraveBull	Corrine	Faith
36	DuMarce	Geraldine	Arlene
37	Marks	Lori	Kim
38	Cochran	Robyn	Rose
39	Jones	R.	Hunter Sage
40	Jackson	Ari	Lashey Selvage
41	Selvage	Aaliyah	Micheala
42	Selvage	Serena	Maxine
43	Goodsell	Teagan	Anthony
44	Bursheim	Jaia	Marie

Vivian Cordelia Youngbear, et al.

Youngbear	Surname	First Name	Middle Name
1	Youngbear	Vivian	Cordelia
2	Bullhead	Fern	Marie
3	Bullhead	Frank	Louis
4	Bull Head	Kenneth	Jacob
5	Bull Head	Rayden	Kade
6	Bull Head	Renzo	Daz
7	Bull Head	Bethany	Jade
8	Bull Head	Meleah	Chante
9	Crow Feather	Carter	Wayne
10	Bull Head	Chaston	Wade
11	Bullhead	Catherine	Cecelia
12	Still Day	Victor	Clarence
13	Stillday	Zyon	Winter
14	StillDay	Christopher	James
15	Still Day	Rosa	Leigh
16	StillDay	Whitley	Jo
17	StillDay	Whitney	Marie
18	Bullhead	Valerie	Margaret
19	Tortalita	Xavier	Quinn
20	Tortalita	Coraetta	Marcelina
21	Tortalita	Cecelia	Marie
22	Young Bear	Dorine	Rae
23	DragsWolf	Noble	James
24	Young Bear	Trivian	Ruth

25	Rodriguez	Lynnell	Francine
26	Nault	Christian	Sage
27	Young Bear	Marva	Ranae
28	Three Stars III	Harry	Paul
29	Three Stars	Ethan	Cole
30	Young Bear	Lynette	Laverne
31	Abbott Half Red	Frank	Coulton
32	Abbott Half Red	Talburt	Joseph
33	Young Bear	Maryetta	Joann
34	Young Bear	Monica	Faith
35	Young Bear	Angela	Rose
36	Garreau	Eva	Rose
37	Garreau	Justin	William
38	Garreau	Jasper	David
39	Young Bear III	David	Kenneth
40	Bull Head	Jazz	Talen
41	Still Day	Ginnivieve	London
42	Lone Bear	Benjamin	Gavyn
43	Lone Bear	Lennox	Marshall
44	Bull Head	Tyler	Blaze

(3) (3)

No. 09-579, 09-580

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICUS CURIAE* OGLALA SIOUX TRIBE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The interest of the Oglala Sioux Tribe ("the OST") in this litigation stems from the fact that approximately 2,000 members of the Tribe are also members of the plaintiff class of lineal descendants of the 1886 Mdewakantons, commonly known as the loyal Sioux (or the loyal Mdewakantons), in *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009), *rev'd*, 62 Fed. Cl. 521 (2004).

Thus, the Tribe has an interest in promoting the general welfare of these tribal members by having the Court grant the Petitioners' Petition for a Writ of Certiorari in the *Wolfchild* case, reverse the judgment of the Federal Circuit, and hold in accordance with the decision of the Court of Federal Claims that the Federal Government owed a fiduciary obligation to the lineal descendants of the 1886 Mdewakantons by virtue of the three Appropriations Acts of 1888, 1889, and 1890, which directed the expenditure of specified monies by the Secretary of the Interior ("the Secretary") for the benefit of these Indians – as well as their families – who had remained loyal to the

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.3(a). No counsel for any of the parties has authored this brief, and no person or entity other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

white settlers during the Sioux conflict in Minnesota in 1862. *See* Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29 ($ 20,000); Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93 ($ 12,000); Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349 ($ 8,000). The Federal Government breached this fiduciary obligation, thus making the Federal Government liable in money damages for breach of trust to the *Wolfchild* plaintiffs, including those plaintiffs who are also members of the OST.

The OST wishes to emphasize that it is taking no position on the efforts of the *Wolfchild* plaintiffs to seek relief other than money damages for breach of trust from the Federal Government under the Indian Tucker Act. However, the OST does not endorse the efforts of the *Wolfchild* plaintiffs to claim or take reservation and/or trust land from either the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community or the Lower Sioux Indian Community, or to claim or take "income, profits and proceeds from all [of these tribes'] reservation businesses," including "casino profits."

SUMMARY OF THE ARGUMENT

Aside from the conflict in the circuits that has been highlighted by the *Wolfchild* Petitioners, review should be granted because the Federal Circuit decided an important federal question concerning the creation of trust relationships in favor of groups of Indians in a way that conflicts with the fundamental

principles of law laid down by this Court in *United States v. Mitchell,* 463 U.S. 206 (1983) [*Mitchell II*] and *United States v. White Mountain Apache*, 537 U.S. 465 (2003). The Federal Circuit gave undue emphasis to the fact that the Appropriations Acts do not contain the word "trust", as well as to the context and legislative history of those Acts, even though the Acts presumptively created a trust by giving the Secretary, as trustee, control and supervision over the appropriated monies and the property purchased with those monies (the trust corpus) and by adequately defining a class of beneficiaries, namely the loyal 1886 Mdewakantons and their lineal descendants.

The Court should also grant the Petition for a Writ of Certiorari in order to address and decide an important question of federal law regarding whether Congress, in order to terminate a trust in favor of Indians, must use clear and explicit or plain and unambiguous language, especially since the Federal Circuit's decision of this question is in conflict with an earlier decision of the First Circuit.

ARGUMENT

I. Review By This Court Should Be Granted To Correct The Federal Circuit's Decision Of An Important Federal Question Regarding The Creation Of Trust Relationships In Favor Of Indians, As That Decision Conflicts With The Relevant Decisions Of This Court, Namely *Mitchell II* And *White Mountain Apache*.

The *Wolfchild* petitioners argue at length that their Petition for a Writ of Certiorari should be granted because the Federal Circuit's decision in *Wolfchild* conflicts with the Eighth Circuit's decision in *Smith v. Babbitt*, 100 F.3d 556 (1996), *cert. denied sub nom. Feezor v. Babbitt*, 522 U.S. 807 (1997). *See* U.S. Sup. Ct. Rule 10(a). Aside from the need to resolve this conflict in the circuits, the OST, as *amicus curiae*, urges that the Petition should also be granted because the Federal Circuit decided an important question of federal law in a way that conflicts with the relevant decisions of this Court. *See* U.S. Sup. Ct. Rule 10(c).

First, this Court has held that "a fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over . . . property belonging to Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) [*Mitchell II*]. In such cases, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees [or, as in this case, the loyal Mdewakanton Sioux and their lineal descendants,])

and a trust corpus (Indian timber, lands and money [or, as in this case, property, improvements to property, and money])." *Id.* Moreover,

> "[(w)here] the Federal Government takes on or has control or supervision over tribal [or Indian] monies or properties, *the fiduciary relationship normally exists* with respect to such monies or properties (unless Congress has provided otherwise) *even though nothing is said expressly* in the authorizing or underlying statute (or other fundamental document) *about a trust fund, or a trust or fiduciary connection.*"

Mitchell II, 463 U.S. at 225 (emphasis added), quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980).

In other words, the Court in *Mitchell II* recognized that the Federal Government's control or supervision of tribal or Indian properties is ordinarily sufficient to create a trust. *See White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1375 (Fed. Cir. 2001) ("[T]he language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship."), *aff'd*, 537 U.S. 465 (2003). The *Mitchell II* rule operates as a presumption that in such circumstances a fiduciary relationship exists despite the absence of an express mention of the word "trust". *See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) ("This rules operates as a presumption. . . . Therefore, courts correctly recognize a

trust relationship even where it is not specifically laid out by statute.") (citations omitted).

This presumption has been applied by the Federal Circuit in previous cases to recognize a trust obligation even where a statute did not mention the word "trust". *See, e.g., LeBeau v. United States*, 474 F.3d 1334, 1341 n. 5 (Fed. Cir.) (relying on *Mitchell II* in support of holding that terms of 1972 Distribution Act created a trust responsibility because the United States retained control over tribal monies while the tribes were preparing their rolls subject to the Secretary of the Interior's approval, and while the Secretary was preparing the roll of lineal descendants), *cert. denied*, 551 U.S. 1146 (2007). It has likewise been applied by the Federal Circuit to recognize fiduciary obligations to individual Indian allottees going beyond the limited or bare trust recognized by the Court in *Mitchell I*[2] under the General Allotment Act. *See Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996) ("Under *Mitchell II* then, as properly (and literally construed) the assumption by Congress and/or the Secretary, its delegatee, of control of allottee money or property beyond the limited trust embodied in the General Allotment Act imposes on the government a fiduciary duty to the allottees.").

The Federal Circuit's decision in *Wolfchild*, however, improperly turns the *Mitchell II* presumption on its head. The Federal Circuit reasoned that,

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[2] *United States v. Mitchell*, 445 U.S. 535 (1980) [*Mitchell I*].

"[w]hile it is true that a statute need not contain the word 'trust' in order to create a trust relationship, *the failure to use that term gives rise to doubt that a trust relationship was intended.*" *Wolfchild*, 559 F.3d at 1238 (emphasis added and citations omitted). In other words, the Federal Circuit appeared to presume that a trust relationship was not intended absent an express mention of the term "trust," even though the Federal Government clearly had both control and supervision of the monies appropriated by Congress for the benefit of the 1886 Mdewakantons and their lineal descendants, and of the property purchased by the Secretary with such monies. Accordingly, the Federal Circuit gave great weight to the fact that the Appropriations Acts, instead of using the term "trust", contained "simple" or "minimal" statutory directives, which the appeals court reasoned were insufficient to "properly manifest" an intention on the part of Congress to create a trust relationship. *See id.*, quoting *Restatement (Third) of Trusts* § 13 (2003).

Thus, the reasoning of the Federal Circuit in this case is totally at odds with this Court's opinion in *Mitchell II*. Furthermore, its presumption that it is doubtful that a trust relationship is created absent the use of the term "trust" in the statute or regulation under review is not supported by the authorities cited by the appeals court. The Cohen treatise[3] actually

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[3] *See Cohen's Handbook of Federal Indian Law* § 5.05[1][b], at 429-30 (Nell Jessup Newton et al., eds., 2005) ("[W]hile the presence of the word 'trust' in a statute by itself is neither

(Continued on following page)

confirms the rule of *Mitchell II* that the use of the word "trust" in a statute is not "necessary" to create a compensable claim for breach of trust. As for the passages quoted from Justice Ginsburg's concurring opinion in *United States v. White Mountain Apache*, 537 U.S. 465, 480-481 (2003), Justice Ginsburg nowhere stated or indicated that the absence of the term "trust" from a statute automatically makes it doubtful that the statute creates a trust relationship. Rather, in discussing the Court's holding in the companion case of *United States v. Navajo Nation*, 537 U.S. 488 (2003), in which she wrote the opinion for the Court, Justice Ginsburg observed that the Indian Mineral Leasing Act of 1938 ("IMLA") and its implementing regulations, at issue in *Navajo Nation*, "lacked the characteristics that typify a genuine trust relationship: Those provisions assigned the Secretary of the Interior no managerial role over coal leasing; they did not even establish the 'limited trust relationship' that existed under the law at issue in *Mitchell I*." *White Mountain Apache*, 537 U.S. at 480-481.

By contrast, the Appropriations Acts specifically gave the Secretary discretionary control and supervision over the expenditure of the funds appropriated by Congress, and by implication, over the use and

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necessary nor sufficient to create a compensable claim, statutory or regulatory language using terms normally associated with trust or fiduciary law will be given great weight in the analysis."), cited at *Wolfchild*, 559 F.3d at 1238.

occupancy of the land and other property purchased with those funds, for the benefit of the loyal Mdewakantons and their families, *see, e.g.*, 1890 Act, 26 Stat. at 349 (" . . . to be expended by the Secretary of the Interior as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof"), and further directed the Secretary that the appropriated funds should be "so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation." *See* 1889 and 1890 Acts, 25 Stat. at 992-93; 26 Stat. at 349. Thus, unlike the IMLA in *Navajo Nation*, the Appropriations Acts clearly gave the Secretary a comprehensive "managerial role" over the appropriated monies and the property purchased with those monies.

Moreover, this Court in *Mitchell II* made it clear that its construction of the statutes and regulations at issue in that case as having created a trust and fiduciary obligation on the part of the Government was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. The Court recognized that it had "previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.*, quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

By contrast, while recognizing that "[c]onsistent with the principle that there is a 'general trust relationship between the United States and the Indian people,' [quoting *Mitchell II*, 463 U.S. at 225], Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants," *Wolfchild*, 559 F.3d at 1248, the Federal Circuit ruled that the "general trust relationship" principle did not apply to the instant case because the 1886 Mdewakantons and their descendants were not a tribe of Indians. *See id.* ("[T]he 1886 Mdewakantons were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance."). The "general trust relationship" principle, however, applies to all "the Indian people," *Mitchell II*, 463 U.S. at 225, including individual Indians, not just tribes, and would certainly extend to the 1886 Mdewakantons and their descendants. Again, the Federal Circuit's refusal to recognize the applicability of the "general trust relationship" principle to all Indians, not just tribes, conflicts with *Mitchell II*.

The Federal Circuit's decision also conflicts with this Court's pronouncement in *White Mountain Apache* that "[w]here as in *Mitchell II*, 463 U.S. 206, 225 . . . (1983), the relevant sources of substantive law create 'all of the necessary elements of a common-law trust,' there is no need to look elsewhere for the source of a trust relationship." *White Mountain Apache*, 537 U.S. at 475 n. 3. The Court of Federal

Claims, after quoting this passage from *White Mountain Apache*, determined that "[t]he 1888, 1889, and 1890 Acts in combination have [the] three key features [of a common-law trust] that show the creation of a trust." *Wolfchild*, 62 Fed. Cl. at 540-541. First, the language of the Appropriation Acts "functionally appoints the Secretary of Interior to serve as the trustee to spend the funds on behalf of the beneficiaries, the loyal Mdewakanton." *Id.* at 541. Secondly, the Appropriations Acts designated the loyal Mdewakanton and their families (which the Secretary interpreted as including lineal descendants) as the beneficiaries of the trust. *See id.* at 541-542. Third, the Appropriations Acts created a trust corpus that included property, improvements to property, and monies. *Id.* at 541.

In reversing the Court of Federal Claims, the Federal Circuit did not follow the approach of *White Mountain Apache* in addressing whether the three fundamental elements of a common law trust were present. Instead, the appeals court focused on (1) the absence of any express use of the term "trust" in the Appropriations Acts themselves, *Wolfchild*, 559 F.3d at 1238; (2) the fact that each of the Appropriations Acts "was enacted as part of a much longer statute that contained appropriations for payment of the expenses of the Indian Department and for the support of certain Indian tribes . . . [which] contained no language suggestive of a trust relationship," *id.* at 1238-1239; and (3) the fact that "nothing in the legislative history of the three provisions at issue in this case

indicates that they were designed to create a trust relationship." *Id.* at 1240.

As already pointed out above, the Federal Circuit's reliance on the absence of the use of the term "trust" conflicts with this Court's decision in *Mitchell II*. As for the appearance of each of the three Appropriations Acts in "much longer" appropriations statutes and the lack of any legislative history that the Mdewakanton appropriations were designed to create a trust relationship, these matters are irrelevant under the approach outlined in *White Mountain Apache*. Since (as the Court of Federal Claims correctly determined) the "relevant sources of substantive law," namely the three Appropriations Acts themselves, "create all of the necessary elements for a common-law trust," namely a trustee, a class of beneficiaries, and a trust corpus, "there [was] no need [for the Federal Circuit] to look elsewhere[, such as context or legislative history,] for the source of a trust relationship." *See White Mountain Apache*, 537 U.S. at 475 n. 3.

In sum, the OST respectfully urges the Court to grant the *Wolfchild* Petitioners' Petition for a Writ of Certiorari, not only to resolve the conflict in the circuits pointed out by the Petitioners, but also to correct the Federal Circuit's serious deviation from the principles laid down by this Court in *Mitchell II* and *White Mountain Apache* in deciding an important question of federal law, by holding that the Appropriations Acts created a trust in favor of the loyal Mdewakantons and their lineal descendants.

II. Review Should Be Granted To Decide Whether A Trust In Favor Of Indians Can Be Terminated By Congress Without Either Express Or "Plain And Unambiguous" Language, Since The Federal Circuit's Decision Created A Conflict In The Circuits On This Question.

The OST also urges the Court to grant the *Wolfchild* Petition for a Writ of Certiorari in order to decide an important question of federal law, namely whether a trust whose beneficiaries are Indians can be terminated by Congress without either express or "plain and unambiguous" language to that effect, or the consent of the beneficiaries. In ruling that the 1980 Act, *see* Pub. L. No. 96-557, 94 Stat. 3262 (1980), did not terminate the trust in favor of the loyal 1886 Mdewakantons and their lineal descendants, the Court of Federal Claims pointed out that, while Congress "typically" uses explicit language in terminating trusts in favor of Indians, "the 1980 Act does not state as its purpose that the trust for the Mdewakanton would be terminated." *Wolfchild*, 62 Fed. Cl. at 543. The Federal Claims Court further pointed out that, while the consent of the beneficiaries is generally required in order to terminate a trust, such consent "was not received here." *Id.*, citing *Restatement (Third) of Trusts* § 65(1) (2003).

On appeal, the Federal Circuit nevertheless reversed the Court of Claims on this question also, concluding that "Congress's failure to include express language of trust termination [in the 1980 Act]

cannot be regarded as indicative of an intention not to alter the previous legal relationship among the parties." 559 F.3d at 1258 (footnote omitted).

This Court has long held that in determining congressional intent, the federal courts follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *accord*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). The Court has applied this rule of construction to hold, with respect to the termination of Indian reservations, that the federal courts will not lightly conclude that a reservation has been terminated and will require a clear indication of that fact. *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 444 (1974); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation . . . , and its intent to do so must be 'clear and plain.'") (citations omitted); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (Congress must clearly evince an intent to change boundaries before diminishment will be found).

The Federal Circuit failed to adhere to this rule of construction in holding that the 1980 Act terminated the trust in favor of the loyal 1886 Mdewakantons and their lineal ancestors, despite the

absence of clear and express language to that effect or the consent of the beneficiaries.

The Federal Circuit's decision also conflicts with the decision of the First Circuit Court of Appeals in *Joint Tribal Council of the Passmaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), that "any withdrawal of trust obligations by Congress" would have to be made in "plain and unambiguous" language in order to be effective. 528 F.2d at 380. In so holding, the First Circuit analogized to this Court's holding in *DeCoteau* regarding the termination of Indian reservations. *Id.* at 380 n. 12.

The Court should therefore also grant the *Wolfchild* Petitioners' Petition for a Writ of Certiorari in order to resolve this conflict in the circuits and decide the important question of federal law, never before addressed by this Court, as to the need for clear and explicit or "plain and unambiguous" language in congressional enactments that purport to terminate a trust in favor of Indians, absent the consent of the beneficiaries of the trust.

CONCLUSION

For the reasons set forth above and in Petitioners' Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari requested in this case.

Respectfully submitted,

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